

15-35
176-426

Record No. 2345

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

W. R. MUMPOWER

vs.

HOUSING AUTHORITY OF THE CITY OF BRISTOL
and CITY OF BRISTOL

From the Corporation Court for the City of Bristol, Va.

RULE 14

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P E T I T I O N

*To the Honorable Justices of the Supreme Court of Appeals of
Virginia:*

Your petitioner, W. R. Mumpower, respectfully states that he is aggrieved by a final decree of the Corporation Court for the City of Bristol, Virginia, entered in the above styled cause on the 19th day of July, 1940.

A transcript of the record of said chancery cause accompanies this petition.

STATEMENT OF FACTS

This cause was submitted on complainant's bill, defendants' demurrers thereto and complainant's joinder therein.

Complainant, in his bill, alleges that he is a citizen resident, taxpayer, and property owner of and in the City of
2* *Bristol, Virginia, and attacks as illegal and unconstitutional the creation, organization and function of the Housing Authority of the City of Bristol, hereinafter referred to as the Authority. The bill challenges the right of said Authority to issue bonds, the right of the City Council, by its resolution or ordinance, to authorize the Mayor to appoint members of the Authority, the action of the Mayor in making such appointments, the organization of the Authority, the authority to enter into and the validity of the cooperation agreement between the Authority and the City, the legality and validity of the two contracts between the Bristol Authority and the United States Housing Authority and the legality and validity of the contract between the Bristol Authority and V. L. Nicholson Company. Copies of all the contracts, except the last, are exhibited with the Bill, which prays for a declaratory judgment as to the validity of the entire "Housing Authorities Law" (Chapter 310, Acts of Assembly 1938, Code Supp. Sec. 3145 (1)—(24) Incl.), which will be hereinafter referred to as the "Act". The bill further prays that all functions and actions of the said Housing Authority of the City of Bristol be enjoined.

The grounds of complainant's attack are briefly as follows:

1. The General Assembly is without power to create such Authority.

3* *2. The property of such Authority is not exempt from taxation under Virginia Constitution, Sec. 183.

3. The purpose of the Authority is not a public purpose, and the taking of property by it is for a private use.

4. The bonds of the Authority are bonds of the City of Bristol and are issued in violation of the Constitution of Virginia, Sec. 127.

5. The contract of the City with the Authority is illegal in that it undertakes to bind future members of the City Council in the exercise of their legislative functions contrary to Virginia Constitution, Sec. 185.

The defendants filed separate demurrers to the bill upon the ground that the "Act" is constitutional, and that the acts and contracts complained of are pursuant thereto and in compliance therewith.

The court held that a portion of paragraph 11 of the co-operation agreement between the City of Bristol and Bristol Housing Authority, providing that the City "will vacate and close any streets, roads, roadways, alleys, sidewalks and other places (which the Authority finds are reasonably necessary in the development of the project) located in the areas of such project and adjacent thereto, and a portion of paragraph 12 of the same agreement, binding the City to accept such land as the

4* Authority determines to be reasonably necessary for such streets, and alleys, to be void and *illegal as an illegal delegation of legislative discretion by the City Council.

In all other respects the demurrers were sustained, the injunction denied and the bill dismissed.

ASSIGNMENT OF ERROR

The Court erred in sustaining defendants' demurrer to complainant's bill and in denying the injunction sought by complainant and dismissing complainant's bill.

PRELIMINARY ANALYSIS

The fundamental issue involved is whether slum clearance and low cost housing for public use are purposes within the police power of the legislation. The Act states a two-fold purpose: (1) Slum eradication, (2) Low cost housing for low income families. In determining this issue of public use both of these purposes must be examined and a further question arises, whether if (1) is a public use and (2) if not, does low cost housing become a legitimate public enterprise merely because of its juxtaposition to slum clearance.

Counsel for petitioner will discuss and endeavor to maintain the following propositions in the order stated:

(1) Slum clearance as provided by the Act and undertaken by the local Authority is not a public use.

5* * (2) The creation of low cost housing is not a public purpose.

(3) If slum clearance and low cost housing are public purposes, these purposes are destroyed by the sections of the Act which allow mortgage, sale and lease of the property.

(4) The Legislature is without power to create this political sub-division.

(5) Property owned by the local Housing Authority is not tax exempt.

(6) The cooperation agreement between the City and the Authority is ultra vires and in violation of Sec. 185 of the Constitution of Virginia.

(7) The proposed issue of bonds by the Housing Authority of the City of Bristol is in violation of Sec. 127 of the Constitution of Virginia.

ARGUMENT

(1) SLUM CLEARANCE AS PROVIDED BY THE ACT AND UNDERTAKEN BY THE LOCAL AUTHORITY IS NOT A PUBLIC USE.

At the outset it is to be borne in mind that the mere declaration of a public purpose by the legislature and by the City Council of Bristol does not *ipso facto* establish a public use. It is the function of the judiciary to determine this question in each specific instance.

6* *State Highway Commissioner v. Kreger*, 128 Va. 203, 221, 105 S. E. 217

It must be admitted that slum clearance in the abstract is a public purpose, but in the case at bar, the defendant Authority has already proceeded with its plan and we are able to look at the project itself. It will be readily seen that the slum has not been eradicated. It has merely been removed to another section of the city. The published estimate rental rates of the new houses in the process of erection are clearly beyond the means of the class of people who have been ejected from the district

affected. All slum districts have not been eliminated with the result that there is an overcrowding and even worse source of filth and disease than heretofore existed. The rental rate on the dwellings erected has a two-fold result: the previous slum dwellers are unable to afford the cost; the dwellings will be attractive to families with incomes from \$1,000.00 to \$2,000.00 and there will be a loss of tenants from dwellings which are in no sense slums—in other words, a definite competition with private capital and enterprise.

However, since it is the Act itself which is being attacked, let us view the Act with the view of determining what can be done by the authority under its terms. The Federal statute provides, in substance, that no capital grant or annual contribution shall be made to any local authority *unless the latter agrees to eliminate unsanitary dwelling units to the number of those constructed under a project, subject to a quite elastic provision, however, that gives the United States Housing Authority discretion to grant relief therefrom.

In compliance with such requirement of the Federal statute, the Housing Authority of the City of Bristol entered into a contract with the City of Bristol, whereby not the Housing Authority but the City itself agrees to eliminate the unsafe or unsanitary dwelling units within the territorial limits of the city (Cooperation Agreement, paragraph 2) in any one of three ways, to-wit: (a) by demolishing dwelling units which are on land acquired by the City by purchase or otherwise, including demolition of such dwelling units on land purchased for any public uses; or (b) by causing compulsory demolition, effective closing, repair or improvement of such unsafe, unsanitary dwelling units; or (c) by inducing private owners voluntarily to eliminate such dwelling units.

The effect of the contractual provision is almost completely emasculated by a further provision in the contract (Cooperation Agreement, paragraph 5) which defines unsafe condition as one where by reason of dilapidation, faulty arrangement or design, or lack of ventilation, light or sanitation facilities, 8* a dwelling is detrimental to safety, health *or morals.

Compliance with this requirement for the elimination of unsanitary dwelling units could therefore be secured by the mere act of the City of Bristol in persuading John Doe, as a property owner, to provide a little more ventilation in his home or change

his sanitation facilities, all upon the theory that the existing condition might be detrimental to health. Wide latitude is provided for the flimsiest determination of the existence of such unsafe accommodations as disclosed by Sec. 3154 (4) of the Code by its reference to the degree of overcrowding, the percentage of land coverage, the light, air, space and access available to the inhabitants of such dwelling accommodations, the size and arrangement of the rooms, the sanitary facilities, and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes. If a city building inspector should discover a defect in John Doe's electrical wiring that might cause a short circuit, his persuasion of Mr. Doe to correct it would constitute the elimination of an insanitary dwelling accommodation.

Not only can such hypocritical performance of the slum-clearance obligation of the contract be delayed to a time one year after the completion of each project (Cooperation Agreement, paragraph No. 9) but even default in the performance of 9* *the contract by the City of Bristol would sustain no judgment for money damages and the city, with absolute impunity, could utterly disregard the promise.

(2) THE CREATION OF LOW COST HOUSING IS NOT A PUBLIC PURPOSE.

The dwelling accommodations authorized can hardly be truthfully described as "low cost" because the Federal Act, 42 U. S. C. A., Sec. 1410, indicated an authorization at the rate of \$1,000.00 per room. This cost is for the structure alone and disregards the expenditure necessary for land. If lack of space be one defect of the slums Code Sec. 3145 (3) (j) and a four room unit be regarded as a minimum for a slum family with less than three minors, then it can hardly be said that the project even necessarily under the law will result in a low cost per family unit. The present estimate is beyond the means of the slum dweller and if the experience be used as a guide, actual costs are likely to exceed the estimates. Indeed, were it not that both principal and interest are planned to be absorbed by the United States and its body of taxpayers, the housing accommodations could hardly be rentable at a particular low figure, even with freedom from property taxation.

It is submitted that government interference or operation could be extended to almost every conceivable private

10* *enterprise if the only necessary reason for so doing were that desired result, public health, could be more cheaply obtained for low income classes by use of government funds and tax exemption—the dairy business, the meat packing business, the coal business, the lumber business, the clothing business, until we should have a completely socialized or commonized state.

The erection of “low cost” or any cost dwellings does not tend to be monopolistic, as in the cases of electric power or water supply, nor is wide spread cooperation necessary as in the case of postal service, nor is there involved the permanent use of public streets and highways or resources publicly owned. It is submitted that there is no precedent in this country for extending government competition with private enterprise to such an extent.

Attention is directed to the language of the Mass. Court in *Opinion of Justices*, 211 Mass. 624, 98 N. E. 611:

“Experiments in other lands, where the people have established either no bounds or fragile ones to the absolutism of governmental powers by a written Constitution affords no guide in the determination of what our Constitution permits.”

Slum clearance may be, and if properly carried out, undoubtedly is, a public purpose, but low cost housing is
11* not. *It by no means follows that “low cost housing” is a necessary corollary to slum clearance. We believe it has been demonstrated that slum clearance as provided by the Housing Authority Law and as practiced by the defendant Housing Authority has no necessary connection with “low cost housing” as provided and practiced. Indeed it clearly appears that the class of people ejected from the slum areas in the project are not the class which will benefit from the “low cost housing.” However, since the Housing Authorities Law contemplates each purpose as necessary to the success of the other, it necessarily follows that the Statute, Code Section 3145, being void in part is void in toto.

Robertson v. Preston, 97 Va. 300, 33 S. E. 618
Campbell v. Bryant, 104 Va. 509, 52 S. E. 638

(3) IF SLUM CLEARANCE AND LOW COST HOUSING ARE PUBLIC PURPOSES, THESE PURPOSES ARE DESTROYED BY THE SECTIONS OF THE ACT WHICH ALLOW MORTGAGE, SALE AND LEASE OF THE PROPERTY.

The act is designed to operate in conjunction with the Federal statute (even the term "housing project" is defined to mean a work to be financed in whole or in part by the Federal government) and it contemplates the loss of title of the
 12* property held by the Authority and the surrender *and abolition of the function operating it, in the event of default in the payment of the bonds sold to the Federal agency or the 10 per cent sold to private individuals. We call the Court's attention to the following provisions of the Act, Code Sec. 3145 (8) (d) The Authority may sell, lease or mortgage the property.

Code Sec. 3145 (10), by the second paragraph thereof there may be vested in the obligee of the bonds, including a private holder (Code Sec. 3145 (3) (m)); the right to take possession of the project or acquire title thereto through foreclosure proceedings, free from the restrictions mentioned in Code Secs. 3145 (9) (10), relating to the rents to be charged and the qualifications of the tenants to be allowed to occupy the dwelling accommodations, which provisions are the ones that are alleged to give the project its character of a public purpose.

Code Sec. 3145 (16), by sub-section (a) the revenues of the project may be pledged, and by sub-section (b) the authority may mortgage its real property, and by sub-section (c) the authority may vest in a trustee the right to take possession, and use, operate and manage the project.

Code Sec. 3145 (18), by sub-section (a) the authority may cause possession to be surrendered to the "obligee" mentioned in Sec. 3145 (3) (m).

13* *In view of several repetitions of the provisions relating to mortgaging, foreclosing and pledging, the deliberate design is quite apparent to give to the federal agency a stranglehold over the operation of the local project, even to the point of surrender of the "state" function, to the federal government or to a banking trustee. After such surrender, what then would be the nature of the function? Would the federal government then become an agency of the state, free from the slightest vestige of control by any state official? Suppose, for instance, that under the terms of the deed of trust the trustee, a bank, takes possession of the project on default, and proceeds to rent for the benefit of the bond holders including the holders of the privately sold 10 per cent, entirely free from the limitations as to the amount of

rents to be charged and from the restrictions as to the persons who may qualify as tenants in the dwellings, which limitations are specifically abolished in the last paragraph of Code Sec. 3145 (10). Entirely vanished are the public purposes and the performance of any public function and gone, too, must certainly be any exemption from taxation.

Whatever might seem to be the relative weights of the proprietary function theory and the governmental property-trust theory when it comes to a mortgage, sale or lease of
14* *municipally owned public utilities, it would seem to be a radical departure from accepted principles to authorize permanent loss of control of property held for non-proprietary or strictly "governmental" purposes. If the housing project be considered of a proprietary nature, the aspect of state function is destroyed, and if considered not proprietary, but a state function, then the statute authorizing loss of control of the state functional instrumentality is in derogation of state sovereignty.

We call the Court's attention to the doubt on this point expressed by the learned lower court in his opinion (Pr. 42, 43)

It thus follows that the above quoted provisions of the Act either destroy the act itself, or at least should be held to be void.

4. THE LEGISLATURE IS WITHOUT POWER TO CREATE THIS POLITICAL SUB-DIVISION.

Section 63 of the Constitution of Virginia provides, "The authority of the general assembly shall extend to all subjects of legislation not herein forbidden or restricted."

The creation of political sub-divisions is not specifically or expressly forbidden.

The creation of drainage districts under Code Section 1737 has been upheld by the courts of this state as a valid
15* exercise of the police power.

Strawberry Hill Land Corp. v. Starbuck, 124 Va. 71 97 S. E. 362.

And the creation of sanitary districts under Code Sec. 1560 does not appear to have been challenged.

However, if the public purpose of the Housing Authorities Law fails because of the inclusion of the house erection element then the case at bar is clearly distinguishable.

The power of the legislature would seem to be lacking for another reason. Section 63 (7) expressly forbids the legislature to exempt property from taxation, and Sec. 183 (a) of the constitution expressly exempts political sub-division from taxation. The legislature cannot do indirectly by creating a political sub-division what it can not do directly, namely, exempt property from taxation. Since the property can not thus be exempt from taxation, and since this is a vital part of the legislation and of the cooperation agreement, the whole act thus becomes invalid.

5. PROPERTY OWNED BY DEFESDANT HOUSING AUTHORITY IS NOT TAX EXEMPT.

Since the statute which purports to create defendant Housing Authority as a political sub-division is invalid, the property of the defendant is, therefore, not exempt by law. It also
16* follows that the city's agreement not to tax the *property (Cooperation Agreement, Sec 10) is ultra vires and invalid under Sec. 183 of the Constitution.

City of Bristol v. Dominion National Bank, 153 Va. 71, 149 S. E. 632.

6. THE COOPERATION AGREEMENT BETWEEN THE CITY AND THE AUTHORITY IS ULTRA VIRES AND IN VIOLATION OF SECTION 185 OF THE CONSTITUTION.

Complainant calls Court's attention to Sec. 10, 11 and 12 of the Cooperation Agreement. The pertinency of these paragraphs is apparent when read in conjunction with the requirements of the United States Housing Act as a condition for the grant of Federal funds by use of loans and contributions.

In paragraph 10 the City agrees to furnish to the Authority and its tenants services and facilities within the area of the project without charge, of the same character as those furnished without charge to the other inhabitants of the county including police and health protection and services and street maintenance and specifically the city agrees to maintain in good repair the

public streets within, adjacent or leading to the boundaries of the project. Without charge various services are furnished by the city at the present time to its inhabitants, such as fire protection, police protection, etc. The use of city funds for that purpose is justified. However, our objection is that the city is attempting as a contractual matter, to barter away, surrender and 17* abdicate, the powers granted to it by law and to guarantee what will be the decision of future City Councils in the matter of whether benefit districts should be established in the vicinity of the area of the project or should include the area of the project within such district, or whether the services shall be free.

In paragraph 11 of the contract the city agrees to zone the area of the project, to an appropriate residential classification. No future city council could be mandamus'd to exercise the legislative power to so zone, and whether such zoning or any zoning should be made lies entirely in their discretion. This contract purports to bind future Boards affirmatively to adopt such residential zoning plan.

Paragraph 12 of the agreement binds the Authority to dedicate and the city to accept any land that the Authority determines to use for streets and alleys within the project. If the Authority does decide to use land within the project for streets, the matter of the acceptance thereof by the city is one of legislative discretion as to which no present council can bind any future council.

The lower court has held paragraphs 11 and 12 void as illegal delegations of legislative discretion, and it is submitted that paragraph 10 is void for the same reason.

Under Sec. 13 the city is incurring a financial obligation, the exact amount of which is unknown. However, the amount is certainly substantial. It is, therefore, in violation of 18* *Sec. 185 of the Constitution.

7. THE PROPOSED ISSUE OF BONDS BY THE HOUSING AUTHORITY OF THE CITY OF BRISTOL IS IN VIOLATION OF SEC. 127 OF THE CONSTITUTION OF VIRGINIA.

A. The defendant Housing Authority is an agency of the City of Bristol.

It has been previously shown that the designation of the defendant authority as a political sub-division is invalid.

As a matter of general knowledge, cities and counties in the Commonwealth are separate and distinct political sub-divisions with abutting boundaries and have jurisdiction limited to their immediate defined and separate territories.

.... A city "shall be construed to mean an incorporated community, having within defined boundaries a population of five thousand or more, or any incorporated community containing less than five thousand inhabitants which had a city charter at the time of the adoption of the Constitution; and the word 'town' shall be construed to mean an incorporated community not having a city charter at the time of the adoption of the Constitution, containing within defined boundaries a population of less than five thousand" (Michie's Va. Code of 1936, Title 2, Sec. 6, Clause 16). See also, Constitution Art. VIII, Sec. 116.

The extent to which a county government is contiguous to and borders a city government is inferentially defined in the statutory provision relating to the "Powers of Boards of Counties Adjoining Certain Cities:"

19* "The boards of supervisors of counties adjoining and abutting any city, within or without this State, having a population of one hundred and twenty-five thousand or more, as shown by United States census, and the boards of supervisors of counties adjoining any county which adjoins and abuts any such city and has a density of population of five hundred or more to the square mile, are hereby vested with the same powers and authority as are now vested or which may hereafter be vested in the councils of cities and towns by virtue of the constitution of the state of Virginia, or the acts of the general assembly passed or which may hereafter be passed, in pursuance thereof; . . ." Code, Sec. 2743B, as amended by Chap. 55, Acts of 1938).

Since the Code of the Commonwealth and the Constitution provide for only enumerated political sub-divisions — cities, town, counties—the Housing Authority of the City of Bristol

with an area of operation coincident with the boundaries of the City of Bristol (Housing Authorities Law, Chap. 125B, Sec. 3145 (3) (f) Va. Code of 1936, 1938 Supp.) must be deemed to be an agency of the City, comparable to the City's police, fire, and health departments or other municipal boards, or commissions.

Organization and Government of Cities and Towns (Constitution, Secs. 116-128; Code of 1936, Title 26, Cities and Towns).

Organization and Government of Counties, (Constitution, Sec. 110-115a; Code Chap. 109C).

The Housing Authorities Law, itself, when certain random items are considered, in the aggregate, proves conclusively that a Housing Authority is an agency of a city government.

Thus, the housing act, (Chap. 125B, Sec. 3145 (4), 20* Code of 1936, 1938 Supp.) sets forth that a housing authority is created in each city or county, that the said authority is "to be known as the 'housing authority' of the city or county," and that "such authority shall not transact any business or exercise its powers until or unless the governing body of the city by proper resolution shall declare at any time hereafter that there is need for a housing authority to function in such city"

Therefore, as an arm of the City, bonds issued by the Housing Authority are subject to the constitutional (Art. VIII, Secs. 123, 127) and statutory provisions (Code of 1936, Chap. 122, Secs. 3079-3091n) relating to the purposes and procedures for which municipal bonds may be issued, and the limitations on the power of a city or town to incur indebtedness.

Likewise, provisions in the Housing Authorities Law (Secs. 3145 (14)-3145 (16) with respect to the issuance of bonds by a Housing Authority are subject to the above constitutional restrictions, and must be strictly construed.

A municipality cannot be vested by statute with powers the legislature does not possess.

McClintock v. Richlands Brick Corp., et al, 152 Va. 1, 145 S. E. 425, 431.

Any fair reasonable doubt concerning existence of power of a municipality is resolved against its existence.

21* *Bd. of Supervisors of Henrico County v. Richmond*, 162 Va. 14, 173 S. E. 356

B. The Violation of the Constitution.

(1) Article VIII, Sec. 127 of the Constitution of Virginia of 1902, as amended, reads as follows:

"No city or town shall issue any bonds or other interest-bearing obligations for any purpose, or in any manner, to an amount which, including existing indebtedness, shall, at any time, exceed eighteen percentum of the assessed valuation of the real estate in the city or town subject to taxation, as shown by the last preceding assessment for taxes; provided, however, that nothing above contained in this section shall apply to those cities and towns whose charters existing at the adoption of this Constitution authorize a larger percentage of indebtedness than is authorized by this section; and provided further, that in determining the limitation of the power of a city or town to incur indebtedness there shall not be included the following classes of indebtedness.

"(a) Certificates of indebtedness, revenue bonds or other obligations issued in anticipation of the collection of the revenue of such city or town for the then current year; provided that such certificates, bonds or other obligations mature within one year from the date of their issue, and be not past due, and do not exceed the revenue for such year;

"(b) Bonds authorized by an ordinance enacted in accordance with section One Hundred and Twenty-three, and approved by the affirmative vote of the majority of the qualified voters of the city or town voting upon the question of their issuance, at the general election next succeeding the enactment of the ordinance or as a special election held for that purpose for a supply of water or other specific undertaking from which the city or town may derive a revenue; but from and after a period to be determined by the council, not exceeding five years from the date of such election, whenever and for so long as such undertaking

22* fails to produce *sufficient revenue to pay for cost of operation and administration (including interest on bonds issued therefor), and the cost of insurance against loss by injury to persons or property, and an annual amount to be covered into a sinking fund sufficient to pay, at or before maturity, all bonds issued on account of said undertaking,

all such bonds outstanding shall be included in determining the limitation of the power to incur indebtedness, unless the principal and interest thereof be made payable exclusively from the receipts of the undertaking."

To the same effect, see "Bond Issues by Cities and Towns," Michies Code of 1936, Chap. 122, Secs. 3079, (amended, 1938, Acts, p. 33, 3080)

(2) This section must be read in the light of the relevant sections of the Code, as cited above. It is elementary that all related provisions of the Constitution and pertinent statutes must be considered and read together in construing a constitutional provision.

Board of Supervisors of King and Queen County, v. Cox, et al, 156 S. E. 755, 761, 155 Va. 687

Likewise, Sec. 43 (E) of the Charter of the City of Bristol, contains the same 18 per cent restriction as contained in the Constitution. It is not necessary to go into the figures showing the effect of the issuance of these bonds on the present bonded indebtedness of the total property in Bristol. The allegation contained in the bill is taken as true for the purpose of this demurrer.

In any event, the limitations of this section apply to the charters of all cities and towns which do not in terms
23* *authorize a percentage of indebtedness larger than 18 percent of the assessed valuation of taxable real estate in such city and town.

Robertson v. City of Staunton, 104 Va. 73, 74, 51 S. E. 178, 179.

(3) Moreover, the constitutional limitation of the indebtedness of a city does not pertain to:

(a) Tax anticipation warrants or bonds maturing in a period not exceeding one year.

(b) Revenue bonds authorized by an ordinance validly passed by the City Council (in accordance with Art. VIII, Sec. 123 of the Constitution) and approved by a majority of the qualified voters of the city. However, such bonds are subject to inclusion within the limitation on the city's power to incur

indebtedness if the anticipated revenue, within a period specified by the City Council (not exceeding 5 years from election date) is insufficient to cover expenses of the operation and administration of the undertaking, and the interest and principal on the bonds.

"In other words, in determining the limitation of the power of a city to incur indebtedness there shall not be considered the indebtedness mentioned in sub-section (a) and sub-section (b) of Sec. 127."

McDaniel v. City of Clifton Forge, 137 Va. 650, 120 S. E. 143, 144.

It must be noted, parenthetically, that Section 123 of the constitution, providing the method of passing an ordinance authorizing the borrowing of money by the municipality is self-executing.

24 *

Ennis v. Town of Herndon, 168 Va. 539, 191 S. E. 685, 690.

(4) Clearly, the proposed issuance of the bonds of the Housing Authority of the City of Bristol falls within the constitutional limitation embraced in Sec. 127 (b). Therefore, as revenue bonds are payable entirely from the revenue of the undertaking, "an affirmative vote of a majority of the qualified voters of the city voting upon the question at an election duly called for the purpose" is essential.

CONCLUSION

We wish to emphasize to the Court that the real evil attacked by the bill and which we have attempted to show in this brief is that the low cost new housing construction program, which is really the heart of the Housing Authority Law, is a socialistically unconstitutional field of public endeavor and that under the rule that those things cannot be done indirectly which cannot be done directly, the attempted legitimatization of this new housing construction program by the inclusion of a slum clearance purpose should fail.

Counsel for petitioner adopt this petition as their brief.

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*Copy of this petition was delivered to Donald T. Stant, Esquire, counsel for Housing Authority for City of Bristol

and to Floyd H. Roberts, Esquire, counsel for the City of Bristol, on the 21st day of August, 1940.

JONES and WOODWARD,
Counsel for Petitioner.

I, Wm. H. Woodward, Attorney, practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion the final decree complained of in the foregoing petition for appeal should be reviewed.

Wm. H. WOODWARD.

Received August 21st 1940.

P. W. C.

Appeal allowed. Bond \$300.00.

PRESTON W. CAMPBELL.

Received August 23, 1940.

M. B. W.

RECORD

In the Corporation Court of the City of Bristol, Virginia.
W. R. Mumpower
vs.
Housing Authority of the City of Bristol and City of Bristol.

Be it remembered that heretofore, to-wit, on May 13, 1940 W. R. Mumpower filed his original bill against the above named defendants therein, which bill, the exhibits thereto, the separate demurrers of defendants, and all other material proceedings had in said cause, are in the following words and figures:

ORIGINAL BILL. Filed May 13, 1940

To the Honorable J. L. Cantwell, Jr., Judge:

Complainant above named respectfully represents:

1. That he is a citizen resident, property owner and taxpayer of the City of Bristol, Virginia, and among other real estate owned by him is that capable of being developed, improved and rented; that as such taxpayer and property owner his interests are both generally affected by the facts hereinafter set forth, as are all other taxpayers and property owners similarly situated.

2. That the defendant Housing Authority purports to be a political sub-division of the State of Virginia, created by Chapter 310 of its General Assembly, approved March 28, 1938, (Code Supp. 1938, section 3145), pursuant to which the Council of defendant City by ordinance or resolution adopted and approved by its Mayor on September 6, 1938, declared of its own motion that there was need of such an Authority, in the language following:

page 3] "RESOLVED by the Council of the City of Bristol, Virginia, under the provisions of Chapter 310 of the Acts of Assembly of Virginia of 1938, that there is in said City of Bristol need for a housing authority, and in connection therewith does hereby find and declare, of its own motion, that in-

sanitary and unsafe inhabited dwelling accommodations exist in the City of Bristol, and that there is a shortage of safe and sanitary dwelling accommodations in the City available to persons of low income at rentals which they can afford.

"RESOLVED FURTHER that a copy of this resolution be transmitted by the Clerk to the Mayor, in accordance with said Aact."

Pursuant to said act and ordinance, the Mayor of defendant City appointed five commissioners of said Authority, designated its first chairman and filed a certificate thereof with the Clerk as required by said act; that said appointees thereafter took and subscribed the required oath, and on the 22nd day of September, 1938, held their organization meeting and elected a Chairman and Vice-Chairman and employed a Secretary, who is known under the Act as an Executive Director, and has since acted as such. The term of office of one Commissioner (who has been appointed as the first Chairman) having expired, the Mayor re-appointed him, and upon his later resignation appointed his successor, and thereupon another Chairman was duly selected by the Commissioners then in office and as thus constituted the defendant Authority has since continued to act and is now acting.

3. That the defendant City is a municipal Corporation organized, created and existing under the general laws of the State of Virginia, with the power to sue and be sued, contract and be contracted with, and with all powers, privileges and duties incident to and necessary to the orderly functioning of such corporation.

page 4] 4. That the authority, if any, for the action of the Mayor in the appointment of the defendant members to said Authority; the authority, if any, for the action of the City Council in passing the aforementioned resolution; the authority, if any, for the acts of the defendant Authority, heretofore and hereinafter set forth, is derived from, and by virtue of, the provisions of the aforesaid Chapter 310 of the Acts of the General Assembly of 1938.

5. That as a means of financing the development of a low-rent housing project or projects, the defendant Authority approved, and authorized the execution of, a contract with the United States Housing Authority (hereinafter called the "US-

HA''), dated June 13, 1939, whereby the said USHA agrees to purchase bonds of the said Authority in the sum of SIX HUNDRED FORTY FOUR THOUSAND DOLLARS (\$644,000.00), to bear interest at the rate of three and one-fourth per centum ($3\frac{1}{4}\%$) per annum, payable serially over a period of years beginning in 1955 and ending in 1999, all as more fully appears by reference to a copy of the loan contract hereto annexed, made a part hereof, and marked "Exhibit Loan Contract."

6. That as a means of financing the operation and maintenance of said projects, so as to enable the said Authority to maintain the low-rate character of said projects, the defendant Authority has approved and authorized the execution of an annual contributions contract with the USHA, dated June 13, 1939, whereby the USHA agrees to contribute to said Authority annually, over a period of sixty (60) years, a sum of money equal to three and three-fourths per centum ($3\frac{3}{4}\%$) page 5] of the actual development cost of the projects, as determined by the USHA, but in no event to exceed the amount of TWENTY NINE THOUSAND FIVE HUNDRED AND FIFTY DOLLARS (\$29,550.00) annually, all more fully appearing by reference to a copy of said annual contributions contract hereto annexed, made a part hereof, and marked "Exhibit Annual Contributions Contract."

7. That the City and the Authority have entered into a cooperation agreement under date of March 27, 1939, whereby the City agrees that, during the period commencing with the date of the acquisition of any part of the site or sites for each project, and continuing throughout the useful life of such project, it will not levy any taxes against the project and it will furnish, without cost or charge to the Authority or the tenants thereof, municipal services and facilities for such project and the tenants thereof, of the same character as those furnished without cost or charge for other dwellings and inhabitants in the City. A copy of said agreement is hereby annexed, made a part hereof and marked "Exhibit Cooperation Agreement."

8. That pursuant to said contracts, the Authority has acquired by purchase and condemnation proceedings all of the real estate determined upon by it as needed for its purposes, covering and including both its white and colored projects (except that one condemnation proceeding is yet pending involving

only one lot) ; has issued its advance loan notes to the USHA in the sum of \$ for the purposes of paying therefor; has received the funds on said notes and has paid for and acquired title to all of said property except the one lot now involved in said condemnation proceeding.

page 6] 9. That defendant Authority, on the 23rd day of February, 1940, entered into a contract with V. L. Nicholson Company, Incorporated, for the demolishing of all buildings on the sites so acquired for both the white and colored projects, for doing the necessary grading and for the construction of 145 units on the projects to be occupied by white tenants, and 74 units to be occupied by colored tenants. The total contract price for such demolishing, grading and construction of units is \$586,000.00; work has commenced thereunder; practically all existing buildings have been demolished; the greater part of grading has been done and construction work begun.

10. That pursuant to the loan contract referred to herein, the defendant Authority proposes to issue bonds in the total authorized amount of \$788,000.00, and unless restrained by this court, will issue, sell and deliver such bonds; that the defendant Authority proposes to issue such bonds without submitting them for approval to the qualified voters of the City of Bristol, and complainant is advised that said bonds will constitute a bonded indebtedness of said City, in violation of Section 127, paragraph (b), of the Constitution of the State of Virginia.

Complainant is advised that the said bonds which the defendant Authority proposes to issue, and referred to in the preceding paragraph, are purported to be issued under Section 14 of Chapter 310 of the Acts of the General Assembly of 1938, and that it proposes to issue said bonds as being obligations of the Housing Authority of the City of Bristol; that said bonds will in fact constitute obligations of the City of Bristol, all in violation of Section 127, paragraph (b), of the Constitution of the State of Virginia; that the said Housing Authority of the City of Bristol is in fact an agency of the City of Bristol, is not a separate legal entity, and that the bonds of said Authority will constitute an indebtedness of said City.

11. Complainant is further advised and alleges that the above-mentioned proceedings and action of the City Council in authorizing the Mayor to appoint members of the Authority; the action of the Mayor in making such appointments; the organization of the Authority; the cooperation agreement between the Authority and the City; the contracts between USHA and the Authority; the contract between the Authority and V. L. N. Co., are all illegal and invalid for the following reasons:

(a) The General Assembly was without power to create in each city and county (political sub-divisions of the State) other political sub-divisions to be known as housing authorities, and any proceedings taken or act done, under the provisions of Chapter 310 of the Acts of the General Assembly of 1938, are void and of no effect.

(b) Property owned by housing authorities, created by Section 4, Chapter 310, Acts of the General Assembly of 1938, is not exempt from taxation under the provisions of Section 183, Article 13, of the Constitution.

(c) Slum clearance and low-rent housing for persons of low income are not public purposes, and the exercise by the Authority of the power of eminent domain will constitute a taking of private property for a private use and for private purposes, in violation of the fundamental principles of a republican form of government.

page 8] (d) The bonds proposed to be issued by the Authority will constitute an increase in the bonded indebtedness of the City, in violation of Section 127 of Article VIII of the Constitution.

(e) The cooperation agreement between the City and the Authority is an attempt on the part of the present City Council to bind its successors in office in the exercise of governmental functions, in violation of Section 185 of Article XIII of the Constitution.

12. That unless permanently enjoined by the court the defendants will, in furtherance of the said housing program, cause great and irreparable damage to the plaintiff and to all other property owners and taxpayers similarly situated, by engaging in an illegal enterprise tending to destroy the rental value of their property and greatly increase their tax burden.

13. In addition, complainant alleges that there exists an actual controversy between him and others similarly situated and the defendants; that the validity and interpretation of the Act, ordinance and contracts in question, as well as the rights of plaintiff, are involved and should be determined by this court, and a declaratory decree or judgment entered thereon and concerning the same.

14. Complainant therefore prays:

(a) That Housing Authority of the City of Bristol and City of Bristol be made parties defendant hereto and required to answer this bill, but their answers under oath are waived.

(b) That the action of the City Council in authorizing the Mayor to appoint the members of said Authority, page 9] and all the acts of said Authority to be declared null and void; that the defendants, and each of them, be enjoined from carrying out the contracts described herein and from the issuance of any bonds for the purpose of carrying out the proposed project or projects; from further acquiring title to any land either by gift, demise, purchase or condemnation for such purpose or projects; from taking any further steps in furtherance of such projects, and that Chapter 310 of the Acts of the General Assembly of 1938 be declared invalid and unconstitutional.

(c) That a declaratory decree or judgment be entered as hereinbefore prayed for.

(d) That such other, further and general relief may be granted as the nature of the case may require or to a court of equity may seem proper.

W. R. MUMPOWER,
By Counsel.

JONES & WOODWARD,

p. q.

page 10] DEMURRER OF HOUSING AU-
THORITY, Filed May 13, 1940

Defendant Housing Authority says complainant's bill and each part thereof is not sufficient in law and assigns the following:

GROUNDS OF DEMURRER

1. The Virginia housing authorities law, and every part thereof, is a void exercise of authority by the General Assembly of the State and is constitutional, and all acts done and contracts executed thereunder, as a result thereof, by defendant Housing Authority are valid and binding.

2. The housing authority law, the things alleged as being done and contemplated thereunder, the resolution adopted by defendant City and quoted in the bill, and all other things alleged to have been done by defendant City are valid under the police power reserved in the constitution.

3. Bonds of defendant Housing Authority are not obligations of defendant City, either under the laws of the State of Virginia or under any agreements between the City and the Authority.

4. The bill alleges no legislative act, resolution, contract, action or contemplated action, which is invalid.

DONALD T. STANT,
BRADLEY ROBERTS,
Attorneys for Housing Authority.

page 11] DEMURRER OF CITY OF BRIS-
TOL, Filed May 13, 1940

The City of Bristol comes and says that the said bill of complaint and each part thereof is not sufficient in law, and for grounds of demurrer states the following:

1. It appears from the allegations of the bill that the defendant Housing Authority has been duly created and established pursuant to Housing Authorities Law as a separate and distinct corporate entity and as a political sub-division of the State with enumerated and specified powers. (Acts of Assembly 1938, page 447, Va. Code, Supp. Sec. 3145 (1) to (24). See Va. Const. Sections 65, 147 and 183 (a).

2. Section 14 of the said law expressly provides that the bonds and obligations of the Authority shall not be debts of the City and that such bonds and obligations shall be payable only out of funds and properties of the Authority.

3. Said Housing Authorities Law is constitutional. (See references above and New York City Housing Authority vs. Muller, (NY) 1 N E 2d 153, 105 ALR 905; Chapman vs. Huntington Housing Authority (W. Va.) 3 S E 2d 502, 507 and cases there cited.

4. There is no equity in the Bill.

FLOYD H. ROBERTS,
City Attorney.

page 12] FINAL DECREE, July 19, 1940

This cause heretofore came on to be heard upon the bill of complaint and the separate demurrers of the defendants to the bill and each part thereof, and was argued by counsel; whereupon, the court took time to consider.

And now, having maturely considered the same, the court is of opinion, for reasons stated in writing, and filed as a part of the record, that the demurrers of both defendants should be sustained as to all portions of the relief prayed, except that portion praying a declaratory judgment as to the validity and interpretations of the contracts herein. Accordingly, it is decreed that the demurrers be sustained to the extent stated, and the bill dismissed to the extent that it asks relief contrary to the action of the court upon the demurrers.

To the action of the court in sustaining the demurrers as to any portion of the bill, complainant by counsel excepted; and to the action of the court in failing to sustain the demurrers as to the whole bill, the defendants, each by counsel excepted.

Thereupon, complaint not desiring to amend his bill, and the defendants not desiring to plead further at this time, but relied upon their demurrers to the whole bill, the court doth proceed to adjudge and decree as follows:

That the following provisions of the Corporation Agreement between the City of Bristol and Bristol Housing Authority of Bristol, Virginia, to the extent that they undertake to bind the present or any future council in the exercise of their future legislative discretion, are invalid and void for reasons stated in the opinion upon the demurrers, said portions being in the following language:

(1) That portion of Paragraph 11 reading: "It further agrees that without charge to the Authority, it will vacate and close any streets, roads, roadways, alleys, sidewalks or other places (which the Authority finds are reasonably necessary in the development of the Project), located in the area of such Project or adjacent thereto."

(2) That portion of the first sentence of Paragraph 12 reading: —And the city agrees to accept for municipal purposes—".

In all other respects the terms of this and the other contracts exhibited with the bill ("The Loan Contract" and "Annual Contribution Contract") are declared valid.

The Court doth further deny the prayer for an injunction herein.

Nothing further remaining to be done in this cause, the same is stricken from the docket.

page 14] MOTION, Filed July 26, 1940.

Defendant Housing Authority moves the court to amend final decree entered at the present term, so as to strike therefrom the holding that a portion of paragraph 11 and a portion of paragraph 12 of the cooperation agreement is invalid, for reasons stated in stipulation of the parties this day filed as a part of the record.

page 15] STIPULATION, Filed July 26, 1940

For the purposes of motion made by Housing Authority on this date, it is agreed that the following are facts, and may be considered as such on said motion:

1. By an ordinance adopted by the Council of the City of Bristol on April 10, 1939, a ten foot alley running all the way through the block in which the colored housing project is located and now under construction, was closed, the ordinance reciting that all the property in said block on both sides of said alley was then owned by the Housing Authority; that it was in the interest of the public that said alley be closed, and that under the terms of the cooperation agreement exhibited in this proceeding, it was likewise proper that said alley be closed.

2. By an ordinance adopted April 19, 1940, all the streets and alleys located within the Housing Authority's white project were closed, the ordinance reciting that said Authority had acquired for its low rent housing and slum clearance projects all the property within the limits of which said streets and alleys were located, and that it was deemed in the interest of the public to close the same, and also in accordance with said cooperation agreement.

3. On November 16, 1939, Minute Book 13, page 88, the Housing Authority proposed to widen Oakview Street ten feet on its eastern side between Quarry and Mary Streets, and offered to give the necessary land for that purpose, provided the City would accept, grade and improve the same for street purposes, and the City Council, by resolution, unanimously accepted such offer.

page 16] The building line on property adjoining the east side of Oakview Avenue has been set back accordingly.

The bill is treated as amended in accordance with this stipulation, and the demurrers filed as applying to the bill as thus amended.

JONES & WOODWARD,
Attorney for Complainant.
DONALD T. STANT,
Attorney for Housing Authority.
FLOYD H. ROBERTS,
Attorney for City of Bristol.

page 17] DECREE ON MOTION, July 26, 1940

This cause came on again this day to be heard upon the written motion of defendant Housing Authority to amend final decree in the respects shown in said motion, supported by stipulation in writing signed by counsel for all parties to this suit.

Upon consideration whereof, the court being of opinion that its construction of the portion of paragraph 11 and 12 of cooperation agreement is correct, and that said portions of contract should be construed under the prayer of complainant's bill, notwithstanding the facts set out in the stipulation aforesaid (which by agreement it treated as an amendment to the bill) doth deny said motion and each of the defendants excepts.

Nothing further remaining to be done herein, this cause is stricken from the docket.

page 18] DECREE, July 31, 1940

By agreement of the parties hereto by their attorneys, it is ordered that in making transcript of record for the purpose of applying for an appeal, instead of copying exhibits as a part thereof, the following shall be certified by the Clerk of this court and sent up along with the transcript as original exhibits:

1. Cooperation agreement between City of Bristol and Housing Authority, dated March 27, 1939.
2. Loan contract between Housing Authority and United States Housing Authority, dated June 13, 1939.
3. Annual contributions contract between Housing Authority and United States Housing Authority, dated June 13, 1939.

Agreed to:

JONES & WOODWARD,
Attorney for Complainant.
DONALD T. STANT,
Attorney for Housing Authority.
FLOYD H. ROBERTS,
Attorney for City of Bristol.

page 19] W. R. Mumpower
vs. OPINION
Housing Authority of the City of Bristol and City
of Bristol.

Complainant, who alleges that he is a citizen, resident, taxpayer and property owner of the City of Bristol, Va., files his bill herein, assailing the organization of the Housing Authority of the City of Bristol, and questioning its right to carry out its functions in general. Specifically, the bill challenges the right of said Authority to issue bonds, the right of the City Council, by its resolution or ordinance, to authorize the Mayor to appoint members of the Authority, the action of the Mayor in making such appointments, the organization of the Authority, the authority to enter into and the validity of the cooperation

agreement between the Authority and the City, the legality and validity of the two contracts between the Bristol Authority and the U. S. H. A. and the legality and validity of the contract between the Bristol Authority and V. L. Nicholson Co., copies of all of the contracts except the last being exhibited with the bill, and asks a declaratory judgment as to the validity of the entire "Housing Authorities Law" (Charter 310, Acts of Assembly 1938, Code Supp. Sec. 3145 (1) — (24) inc.) hereinafter referred to as the "act".

The Grounds of Attack are Briefly:

1. The general assembly is without power to create such Authority.
2. The property of such Authority is not exempt from taxation under Virginia Constitution Sec. 183.
3. The purpose of the Authority is not a public purpose, and the taking of property by it is for a private use.
4. Its bonds are bonds of the City and are illegal as in violation of Virginia Constitution Sec. 127.
5. The contract of the city with the Authority is illegal in that it undertakes to bind future members of the City Council in the exercise of their legislative functions contrary to Virginia Constitution Sec. 185.
6. The general question as to the validity of the entire "Act".

page 20] The defendants file separate demurrers to the bill upon the ground that the "Act" is constitutional, and that the acts and contracts complained of are pursuant thereto and in compliance therewith.

The contentions will be disposed of in the order hereinafter designated.

The court is greatly assisted by the able briefs filed by counsel which demonstrate careful consideration and investigation of the questions involved.

Logical sequence calls for consideration, first, of two basic questions, which are covered by contentions "1" and "3" above. They are, first, the power of the Legislature to create the Housing Authority, and second, whether the property of the Au-

thority is devoted to a public use. Naturally, if the Authority cannot lawfully be created, then that is decisive of the case. Likewise if it may be lawfully created, but may not condemn property for the reason that the property would be devoted to a private use, such Authority would be so hampered in its functions as to practically defeat its purpose.

The handling of these two questions involves consideration of the foundations of the police power and the power of eminent domain.

It has been said, *West Bros. Brick Co. v. Alexandria*, 169 Va. 271, quoting from *Town of Windsor v. Whitney*, 95 Conn. 357, 111 A 354, 356, 12 A. L. R. 669:

"The line between eminent domain and the police power is a hard one to hold with constancy and consistency, and it is not surprising that now and again these two great powers of government have been confused."

Such confusion is probably due almost entirely to the fact that the object to be attained by the exercise of each fundamental power is the same, and the reason for the exercise of the power the same, that is, the public benefit. Such confusion will be avoided in this discussion by handling each separately; however, the similarity of reason and purpose will be apparent.

It is contended that the power of the Legislature to create the Housing Authority may be sustained by several reasons: First, because it is a valid exercise of the police power; second, because embraced in the general legislative power without prohibition or restraint; and, third, because specifically authorized by Virginia Constitution, Section 147.

Let us consider these contentions in the above order, first as to the police power.

The declared purpose of the Act is as follows, Code Sec. 3145 (2):

"It is hereby declared: (A) that the clearance, replanning and reconstruction of the areas in which insanity or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of grave concern to the Commonwealth;—"

The Act then proceeds in paragraph (3) to define a "slum" and to define a "housing project", among other provisions, as in undertaking to clear slum areas and provide decent, safe and sanitary living accommodations for persons of low income.

It is, therefore, to be seen that the Act has as its primary and avowed purpose the eradication of slums, and, in order to accomplish this, it attacks the situation from two angles: one, the elimination of existing slums, and two, the establishment of modern standard living accommodations, an inseparable incident to the accomplishment of the primary purpose.

It is a matter of common knowledge that slum areas where many people gather under the lowest possible standards of living, crowded together in dilapidated hovels which
page 22] are unsafe, unsanitary and unhealthful, in a sordid atmosphere, are the places where is bred, nurtured, and brought to its destructive fruition the greater percentage of crime and moral degeneracy; likewise that such are the breeding places from which disease is spread; and, worst of all, such places are self-perpetuating in that offsprings born under such conditions are damned, from the day of their arrival in this world, to the life of their fathers. Such gathering places of filth, lust, crime, disease and degeneracy are a tragic detriment not only to their inhabitants, but are in every respect a social and economic, detriment to the people at large. Their eradication is a matter of vital concern to the public and to the State. That the existence of such situations is detrimental to the health, safety, morals, general welfare and general prosperity of the people is so clear as not to require any reasoning. That it is a subject for the exercise of the police power is equally clear.

Thus, under well recognized principles, the Authority, to the extent that it is established for the purpose of eliminating slum areas, may be created under the police power of the State.

It does not necessarily follow, however, that this is true as to the functions of the Authority in regard to erecting and maintaining low-rent projects, which proposition will be next examined.

This question is not free from difficulty. It is presented by complainant in his brief in the form of the assertion "— That government interference or operation could be extended to almost every conceivable private enterprise if the only necessary reason for so doing were that (the) desired result, public health, could be more cheaply obtained for low income classes,

by use of government funds and tax exemption x x
 page 23] until we should have a completely socialized or
 communised state."

If the court thought that the effect of a decision favorable to the Authority in this case would have such a result, it would unhesitatingly decree against it.

It is true that this contention finds support in the opinion in *Ohio v. Helvering*, 78 L. Ed. 1307 where it is said:

"Nevertheless, the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on. *Rippe v. Becker*, 56 Minn. 100, 111, 112, 57 N. W. 331, 22 L. R. A. 857. If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal Constitution is concerned, but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power."

However, the statement must be considered in connection with the issue involved in that case. There, the state of Ohio sought to enjoin the collectors of internal revenue for the United States from collecting federal liquor dealer's license taxes on state owned liquor dispensaries. It was contended that the State, in operating the dispensaries, was engaging in a governmental function under its police power, and was not subject to federal taxation in regard to its governmental functions. The Court held that the state was engaging in a proprietary function and as such was taxable.

In considering the effect of this holding, it must be remembered that the liquor traffic has long occupied a peculiar field, when compared to traffic in other commodities, and that the power not only to regulate but to entirely prohibit the traffic has been generally accorded. See *State ex rel George v. Aiken* (S. C.) 20 S. E. 221, 26 L. R. A. 345, and cases cited, including quotation at p. 352, (L. R. A. report) from *Crowley v. Christensen*, 137 U. S. 90 34 L. Ed. 623. The opinion in *State ex rel v. Aiken* is in conflict with *Ohio v. Helvering*, the former sustaining the constitutionality of a state dispensary law by holding that the operation of dispensaries is incident to the regulation of the liquor traffic under the police power. In doing so it distinguishes the case of *Rippe v. Becker*, (cited as authority in *Ohio v. Helver-*

ing) declaring void an "act to provide for the purchase of a site and for the erection of a state elevator at Duluth for public storage of grain" upon the difference that such statute was not aimed at a "business dangerous to the health, morals and safety of the people."

Although state operation of a liquor dispensary may not be, for federal tax purposes, an exercise of the police power, the reasoning of *Ohio v. Helvering* does not prevent State (or delegated) operation of low cost housing projects in furtherance of the elimination of slums. The supplying by the State of liquor, which might otherwise, with full authority, be declared entirely contraband, is entirely different from supplying wholesome living quarters in an effort to get rid of slum conditions, which cannot be prohibited or legislated out of existence. There is a more direct connection between the primary purpose to be accomplished and the means employed to attain it in the latter instance than in the former. In the former it is a matter of enforcement expediency; in the latter it is a matter of prime necessity to the accomplishment of the fundamental purpose.

There is nothing in the nature of the police power which precludes the idea that a state or a political sub-division thereof under authority from the State may, if necessary, enter into a business in order to effectuate a result properly coming within the scope of such sovereign power. The various holdings of the courts and statements of text writers amply justify this statement. Some of those statements in regard to page 25] the police power follows:

A quotation from Black on Intoxicating Liquors in *State ex rel George v. Aiken* (supra) p. 352 thus states the powers:

"It cannot be doubted, however, that the origin of this power must be sought in the very purpose and framework of organized society. It is fundamental and essential to government. It is a necessary and inherent attribute of sovereignty. It antedates all laws, and may be described as the assumption on which constitutions rest; for the state x x must have the power to preserve its own existence in safety and prosperity, else it could neither fulfil the law of its being, nor discharge its duties to the individual. And to this end it is necessarily invested with power to enact such measures as are adopted to secure its own authority and peace, and preserve its constituent members in safety, health and morality. Theories of the state, according as

they tend to enlarge or restrict the legitimate sphere of its functions and activities, will create theories as to the proper limitation of the police power."

Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923, 924, quoted in the same case states thus:

"But neither the amendment (fourteen) broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its 'police power' to prescribe regulations to promote the *health, peace, morals, education and good order of the people*, and to legislate so as to increase the industries of the state, *develop its resources, and add to its wealth and prosperity*." (Italics supplied).

In the "Slaughter House Cases" *Butchers' etc. vs. Crescent City, etc.*, 21 L. Ed. 395, 16 Wall. 36 is said:

"This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries or prescribe limits to its exercise. *Com. v. Alger*, 7 Cush. 84."

"This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizens, *the comfort of an existence in a thickly populated community, the enjoyment of private and social life*, and the beneficial use of property. (Italics supplied)."

" 'It extends', says another eminent judge 'to the page 26] protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state; x x and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State—.' "

"In *Gibbons v. Ogden*, 9 Wheat. 203, Chief Justice Marshall x x says: 'They form a portion of that immense mass of legislation which controls everything within the territory of a state not surrendered to the general government x x ' "

Most timely observations have been made by the Supreme Court of Appeals of Virginia concerning the police power. In *Bowman v. State Entomologist*, 128 Va. 351, 361, sustaining the "Cedar Rust Law", is the following:

"As said concerning the 'police power' in *Lawton v. Steele*, 162 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; 'It is universal-

ly conceded to include everything essential to the public safety, health and morals *and to justify the destruction and abatement x x of whatever may be regarded as a public nuisance x x*. Beyond this, however, *the State may interfere whenever the public interests demands x x'*." (Italics supplied).

Again, in *West Bros. Brick Co. v. Alexandria*, 169 Va. 271, 282, we find the following:

"*In Gorieb v. Fox, supra*" (145 Va. 554) "This court said:

'The Legislature may, in the exercise of the police power, restrict personal and property rights in the interest of public health, public safety and for the promotion of the general welfare.' "

"This power 'embraces regulations designed to promote the public convenience or the general prosperity, as page 27] well as regulations designed to promote the public health, the public morals or the public safety.' *Bacon v. Walker*, 204 U. S. 311, 27 S. Ct. 289, 291, 51 L. Ed. 499."

"*The power is not limited to regulations designed to promote public health, public morals, or public safety, or to the suppression of what is offensive, disorderly or unsanitary, but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity*' *Wulfsonn v. Burden* (1925) 241, N. Y. 288, 150 N. E. 120, 122, 43 A. L. R. 651."

In the same opinion, quoting further from *Gorieb v. Fox*, it is said, p. 285:

"The extent of this power is difficult to define, but it is *elastic and expands automatically to protect the public against the improper use of private property to the injury of the public interest.*" (Italics supplied)

The same thought is thus expressed in *Miller v. Board of Public Works* (Cal) 234 P. 381, 38 A. L. R. 1479, writ of error dismissed 71 L. Ed. 889:

"It is a apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expanding to meet existing conditions of modern life, and thereby keep pace with the social economic,

moral and intellectual evolution of the human race. x x There is nothing known to the law that keeps more in step with human progress than does the exercise of this power."

This quotation is taken from the note to 11 Am. Jur. 980, Const. L. Sec. 253, which also cites *Bowman v. State Entomologist*, (supra).

In a wide review, including the above authorities, the court has found no other statement concerning the scope of the 'police power' which would prevent the State or its political subdivision from entering into an enterprise, provided the other requisites for the exercise of the police power exist. page 28] On the contrary, in *Strawberry, etc. v. Starbuck*, 124 Va. 71 upholding a statute authorizing the creation of drainage districts, the right to establish such districts was sustained under the police power, the court stating p. 78:

"It is a governmental agency, an unincorporated community, organized for a specific and limited purpose *under the police power of the state.*" (Italics supplied).

More will be said of this case later. In passing, reference might also be made to establishment of public irrigation projects in the western states under the police power, the establishment of national banks by Congress under the power incident to its granted powers (*McCullough v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579) and other instances.

So the question resolves itself down to whether low cost housing projects come within these principles of the police power.

The Legislature, by its enactment, has found in the affirmative.

It is true that the Legislature may not act arbitrarily, and that its determination is not final, but subject to supervision by the courts, *Bowman v. State Entomologist*, (supra) at p. 368-369, and cases cited. But, as said in that case:

"However, as appears from the authorities just cited a large discretion is vested in the legislature to determine what the interests of the public require, and also as to what is necessary for the protection of such interests and every possible presumption is to be indulged in favor of the validity of a statute."

See also *State ex rel v. Aiken* (supra); *Allydon Realty Corp v. Holyoke Housing Authority*, (Mass) 23 N. E. (2d)

665; *Chapman v. Huntington Housing Authority* (W. Va.) 3 S. E. (2d) 502, 509 and cases cited; *Danville v. Hatcher*, 101 Va. 523, 529.

There is nothing in the pleadings to suggest that the Legislature has acted arbitrarily or unreasonably. Its enactment must be sustained unless—"It is clearly arbitrary and page 29] unreasonable, having no substantial relation to the public health, safety, morals or general welfare", *West Bros. v. Alexandria* (supra), *Euclid v. Ambler*, 71 L. Ed. 303, *Gorieb v. Fox*, 71 L. Ed. 1228. The evil sought to be remedied is a well known and recognized one, and, although the present method of attack may be novel, it is justified under established principles. These principles were designed to fit just such situations. As said in *Bowman v. State Entomologist* (supra). "General welfare can no more be defined than can police power. These are terms which take on new definitions when we come to face new conditions." Since the Legislature finding is not arbitrary or unreasonable, but has a substantial relation to the public health, safety, morals and general welfare, it must be sustained. *West Bros. v. Alexandria*, 169 Va. 271, 288, quoting *Martin v. Danville*, 148 Va. 247, to the following effect:

"It is a settled rule of the Supreme Court of the United States, if the question of reasonableness is fairly debatable, to hold that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of deciding the question".

Neither is the wisdom of the enactment a matter for the court, *Danville v. Hatcher*, 101 Va. 523. 'Courts cannot run a race of opinions upon points of right, reason and expediency with the law-making powers, Id. p. 534.

"The best indications of public policy are to be found in the enactments of the Legislature," *Danville v. Hatcher*, (supra) p. 532, and "Courts take cognizance of public and social developments and balance them as best they can against private rights." *West Bros. v. Alexandria*, (supra) p. 281.

So the Legislature may, under the police power (which "shall never be abridged," Va. Const. Sec. 159 es- page 30] tablish housing authorities unless otherwise inhabited by the fundamental law.

Next, the Legislature is not prevented from establishing such authorities by the Constitution of Virginia. This Con-

stitution is a limitation and restriction of powers rather than a grant of powers, *Richmond v. Va. Ry.*, 141 Va. 69, 91, *Strawberry etc. v. Starbuck*, 124 Va. 71, 77 and cases cited. Full search reveals that there is nothing therein contained which limits or restricts the power to create such a state agency and designate it as a political sub-division of the Commonwealth. To like effect was the holding in *Strawberry etc. v. Starbuck*, (supra) where it is said, p. 76:

"It has been said that the exact status of such districts is an academic question: Certainly it is not necessary to define it with precision. Such districts have been denominated public; or quasi public corporations, quasi municipal corporations; and it is also said that they are not corporations at all, but merely governmental agencies for the administration of a legislative power. It has been held that a constitutional power expressly granted to the legislature to organize various specified municipal and quasi municipal corporations not including drainage districts, does not preclude the organization of such districts; and that town officers performing duties imposed upon them in connection with the administration of a drainage district, act as representatives of the state and not of the town."

Not only is all specific restriction absent, but on the contrary there is a general grant by Section 63, providing that "the authority of the general assembly shall extend to all subjects of legislation not herein forbidden or restricted."

page 31] "It would seem further that the power is specifically granted by Section 147 providing: "Such public welfare, charitable, sanitary, benevolent, reformatory or penal institutions as the claims of humanity and the public good may require shall be established and operated by the Commonwealth under such organization and in such manner as the general assembly may prescribe."

The purposes of a housing authority under the act appear to meet fully the classification of "charitable, sanitary and benevolent" institutions established for the "public welfare."

Therefore the contention of defendants is sustained as to all three bases of the Legislative power to establish housing authorities.

As an incident to this question, there is drawn in issue the right to delegate to the City the authority to determine when the Housing Authority created for that locally shall become op-

erative, the authority of the mayor to appoint its commissioners and the legality of the organization of the Bristol Authority.

As will be seen from the act, Section 4, the General Assembly has, itself, created a housing authority for each city and county. It remains in a dormant state until brought into action by the local governing body. Therefore, the Authority is already in existence in each locality, with the option in the local governing body to start it functioning or not. Since the Legislature has the authority to create it, it has the authority to determine when it shall act. It has, by the act, delegated this authority to the local governing body. The authorities are overwhelming that this is a valid delegation of legislative authority, *Bowman v. State Entomologist*, 128 Va. 351, 375-379, where the following appears at page 375:

page 32] "This position x x loses sight of the consideration that such clause ('equal protection') permits of a wide scope of discretion on the part of the legislature in classification in the adoption of police laws, and also leaves out of consideration the well understood legislative local option power, so to speak, of permitting localities which may be affected by a police regulation to accept or reject it by vote of the people, or by action of officials of the locality, where a statute is by its terms thus conditioned in its application." (Italics supplied).

In the *Bowman Case* the "cedar rust" law, which was upheld, was left, for its application, to the will of the board of supervisors, or of the qualified voters under the terms set forth in the statute.

See also *Danville v. Hatcher*, 101 Va. 523, 530 where it is said:

"In the absence of constitutional restrictions, it is competent for the Legislature to confer its police power upon municipal corporations in such measure as it deems expedient. It cannot of course, bestow greater power than the state itself possesses, and it must keep within the organic law. Subject to these restraints, it is within the province of the Legislature to invest such corporations with the police power of the state in whole or in part."

Upon the same subject see also *Ex Parte Bassitt*, 90 Va. 679, 682; *Ould v. Richmond*, 23 Gratt. 464, 467; *Strawberry*

ect. v. Starbuck, 124 Va. 71, 76; *Kirkpatrick v. Board of Supervisors*, 146 Va. 113, 126-127 and cases there cited.

Having the power, therefore, to delegate this legislative authority to the locality, then the action of the local body is governed by the same principles as have been referred to in sustaining the legislative finding.

Again, there is no issue of fact raised by the pleadings in this case as to the correctness of the finding of the Council of Bristol, Va., but only an issue of law as to its authority to act. As shown, the Legislature does have the power to authorize it, and the act in specific terms does authorize it. Consequently, the action of the council in passing the resolution, the action of the Mayor in appointing Commissioners and the legality of the organization of the Bristol Housing Authority must all be sustained.

The next question is whether the property of the authority is devoted to public use, so as to support the right of eminent domain.

It is true that the "Act" declares that its purposes are "public uses and purposes for which public money may be spent and private property acquired", Sec. 3145 (2). It is also true that Virginia Constitution, Sec. 58 provides "the term 'public uses' to be defined by the general assembly. However the power to define is not the power to declare, and the declaration is not conclusive. The Legislature has fulfilled its duty to define by the passage of Code Sec. 3030b. Consequently the question still remains a judicial one, as said in *Light v Danville*, 168 Va. 181, 208, "This court has consistently held that whether a condemnation is for a public or a private use, it is a judicial question and is subject to the review of the courts", Citing *State Highway Com'r. v. Kreger*, 128 Va. 203 and *Nichols v. Central Va. Power Co.*, 143 Va. 405. So, it is incumbent upon the court to inquire into this question.

The nature and purpose of a housing authority have already been discussed; it only remains to examine them in the light of established principles.

The opinion in *Light v. City of Danville*, 168 Va. 181, dealing with what is a public use reads as follows:

page 34] "Justice Campbell said in *Nichols v. Central Virginia P. Co.*, 143 Va. 405, 130 S. E. 764, 44 A. L. R. 727, in approving the able and comprehensive opinion of

Judge Cardwell in *Fallsburg etc. Co. v. Alexander*, 101 Va., 98 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855;

“ ‘A use to be public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the state, independent of the rights of the private owner of the property appropriated to the use. The use of property cannot be said to be public if it can be gainsaid, denied or withdrawn by the owner. The public interest must dominate the private gain.’ ”

“The Virginia cases have consistently adopted the above theory of construction, *Miller v. Pulaski* (two cases) 109 Va. 137, 63 S. E. 880, 22 L. R. A. (N. S.) 552, and 114 Va. 85, 75, S. E. 767—” (and other cases there cited).

The case again at p. 206, quotes Chief Justice Campbell in *Nichols v. Central Va. P. Co.* as follows:

“It is difficult at times to observe the line of demarcation between private benefit and public use, when the two are thus so blended, the judicial practice in such cases is to approve the undertaking if it is capable of furthering the public use and disregard the private benefit as a mere incident.”

In *Jeter v. Vinton-Roanoke Water Co.*, 114 Va. 769 781, the court quotes the following:

“The reason of the case and the settled practice of free government must be our guides in determining what is or what is not to be regarded as a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare, which on account of their peculiar character and the difficulty, per-
page 35] haps impossibility, of making provision for them otherwise it is alike proper, useful and needful for the government to provide.”

In view of what has already been said concerning the purpose of the housing authority with reference to eradicating slums, and as an indispensable incident, the providing of decent homes, the court considers that the use of the property in the instant case is a public one.

The fact that the project may primarily benefit only a class does not take away the character of a public use. *Bowman vs. State Entomologist*, 128 Va. 351, 372; *Va. Devel. Co.*

v. Crozier I. Co., 96 Va. 126, 128-9; *Barbier v. Connelly*, 113 U. S. 27, 28 L. Ed. 923, *Strawberry v. Starbuck*, *supra*.

Complainant in paragraph 12 of his bill complains of the competition of the project with the property owned by him. This contention was disposed of in *Williamson v. Housing Authority of Augusta*, (Ga) 199 S. E. 43 in the following language:

"A like argument could be made by a property owner whenever the city takes over activities of the kind originally carried on by private enterprise. The suggestion x x is completely answered by x x (*Alabama Power Co. v. Ickes*, 302 U. S. 464 58 S. Ct. 300, 304, 82 L. Ed. 374). 'The claim that petitioner will be injured, perhaps ruined, by the competition of municipalities brought about by the use of the moneys, therefore, presents a clear case of *damnum absque injuria*. Stated in other words, these municipalities have the right under state law to engage in business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results.'"

page 36] Consequently, the taking of property is for a public use, and that portion of the act bestowing the power of eminent domain is constitutional and does not violate Section 58 of the State Constitution.

We come now to consideration of whether that portion of the "Act" exempting the property of an authority from taxation is constitutional.

The Virginia Constitution, Sec. 183, by paragraph (A) exempts from taxation "property owned directly or indirectly by the United States, the Commonwealth or any political subdivision thereof—" The same section contains the further qualifying paragraph:

"Whenever any building or land, or part thereof, mentioned in this section and not belonging to the state, shall be leased or shall otherwise be a source of revenue or profit, all such buildings and land shall be liable to taxation as other land and buildings in the same county, city or town."

Under the Act, Sec. 3145 (3) a, (4) and (8), a housing authority is created as a "political sub-division" of the Commonwealth. Therefore its property is exempt from taxation under paragraph (a) unless it should be leased or otherwise be

a source of revenue or profit. "Revenue" has been construed to mean "net revenue", *Newport News v. Warwick County*, 159 Va. 571, 594; and under the act Sec. 3145 (9) an Authority is by law restrained from operating for profit or as a source of revenue. Thus the authority cannot bring itself within the constitutional exception subjecting its property to taxation, without violating the statute creating it. It is therefore concluded that the property of the Authority is exempt from taxation, and the portion of the contract between the City of Bristol and the Authority, exempting the property of the latter from taxation is nothing more than a recognition of the constitutional exemption.

The next ground of attack to be considered is number 4 under which it is contended that the bonds of the authority are bonds of the City and are illegal as in violation of page 37] Virginia Constitution Sec. 127.

As ably reviewed by counsel for the Housing Authority in its brief the way in which the city may issue bonds is specifically prescribed by law, and in that way, and that way only, can valid and binding obligations of the city be issued. Charter of Bristol Va. Sec. 42 (a), 42 (n), (k); Code of Va. Sec. 3079-90. Bonds issued under the "housing authorities law" would upon their face, have no semblance of purporting to be bonds of the City. In addition, the language of the Act on the question is unmistakably plain. Section 14 provides:

"The bonds and other obligations of an authority (and such bonds and obligations shall so state on their face) shall not be a debt of the city, the county, the State or any political sub-division thereof (other than the authority) and neither the city or the county, nor the State or any political sub-division thereof (other than the authority) shall be liable thereon, nor in any event shall such bonds or obligations be payable out of any funds or properties other than those of said authority. The bonds shall not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction."

As stated by counsel for the Authority in his brief (in referring to all of the statutory and charter provisions) "In no other manner may the city be bound by the issuance of bonds, and all who purchase are bound by these provisions and limitations of authority and power."

Consequently the contention of complainant in this respect must fail.

Next it is contended that the contract of the City with the authority is invalid in that it undertakes to bind future members of the City Council in the exercise of this legislative functions.

page 38] Specific attention is directed, in complainant's brief to Sections 10, 11, 12 and 13 of the Cooperation agreement. The objection urged is that these provisions constitute an attempt "to barter away, surrender and abdicate, the powers granted to it by law."

As previously noted, it is provided in the Constitution of Virginia, that the 'police power' shall never be abridged.

Upon judicial determination, the principle is stated thus in Cooley's Constitutional Limitation (7th Ed.) p. 400:

"It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that the state cannot barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the exercise of which in full vigor is important to the well being of organized society, and that contracts to that end are void upon general principles, and cannot be saved from invalidity by the provision of the national Constitution now under consideration" (against passing any law impairing the obligation of contracts).

For further statements of the principles, see *Stone v. Mississippi*, 25 L. Ed. 1079, *New Orleans Gas Co. v. Drainage Comm.* 49 L. Ed. 831, 11 Am. Jur. 983, Sec. 254.

"These principles apply to the police power delegated to municipal corporations. Thus, the general police power possessed by a city is a continuing power, and is one of which a city cannot divest itself, by contract or otherwise." 11 Am. Jur. 986, Sec. 254, note 5.

Under these principles it must be determined what portions if any, of the paragraphs from the Cooperation Agreement deal with the police power or legislative power, and, if any be so found, whether they barter away or surrender that power.

That portion of paragraph 10 which deals with taxes and assessments has already been mentioned in another page 39] connection, and it is sufficient to say here that the terms of the contract are no more than an acknowledgment of the legal right of the authority to such exemption. That portion which deals with furnishing municipal facilities

gives no greater right to the Authority than is enjoyed by citizens in general. Maintaining the public facilities is a ministerial function, and therefore subject to contract.

"The duty of a municipal corporation to see that its streets and sidewalks are in a safe condition; and that its sewers and drains are kept in good order, and that its other like municipal obligations are cared for, is a purely ministerial and absolute corporate duty." *Terry v. Richmond*, 94 Va. 537, 545-6.

There is, in this paragraph, no surrender of the police power, or binding of future councils upon legislative matters.

Paragraph 11 deals with zoning, which has been sustained because it is a valid exercise of the police power. *West Bros. Brick Co. v. Alexandria*, 169 Va. 271.

However, the terms of that paragraph applying to zoning are so drawn as not to hamper the discretion of future councils. It only agrees to zone or rezone to *an appropriate site and neighborhood classification*. Such would be the duty of the Council under the law in any zoning ordinance adopted, Code Sec. 3091 (1)-(26). Sec. 3091 (3), in part, provides that the zoning plan shall be made "with a view to conserving the value of buildings and encouraging the most appropriate use of land." By order of Sept. 12, 1939, this court appointed a zoning commission under Sec. 3091 (6) pursuant to resolution of the City Council.

By the second sentence of paragraph 11 the City "agrees that without charge to the Authority, it will vacate and close any streets, roads, roadways, alleys, sidewalks or other places (*which the Authority finds are reasonably necessary in the development of the Project*) located in the area of page 40] said project or *adjacent thereto*." (Italics supplied).

The court is unable to find any basis upon which the validity of this sentence may be founded. It clearly, if sustained, places beyond the control of the local legislative representatives of the people, the determination of matters directly and vitally effecting the public safety. The location of public ways is purely a legislative function.

"A corporation acts judicially in selecting and adopting a plan on which a public work shall be constructed; yet as soon as it begins to carry out that plan, it acts ministerially and is bound to see that it is done in a reasonably safe and skillful manner." *Jones v. Richmond*, 118 Va. 612, 619.

The same case at p. 619 quoting Judge Riley in *Jones v. Williamsburg* says:

"The defendant was empowered by its charter to lay off streets and walks and improve the same, but it was wholly within its discretion when and where it would do so. For the omission to exercise the power, *it being legislative and discretionary*, it would not be liable." (Italics supplied).

It has been said that the test of the validity of an act is not what has been done under it, but what may be done. In the instant case, should the Authority see fit to close Myrtle Street, which borders the white project, and which is a part of the Lee Highway, or to close Mary Street, which passes through this project, and is a much traveled and convenient concrete street, the City would be required to do so. To thus illustrate the extent of the power given by the contract is to demonstrate its invalidity in this respect.

The remaining provisions of paragraph 11 are found unobjectionable because they are thus conditioned: "So far as is possible to require removal thereof and without unusual expense or inconvenience." This provision safeguards the legislative discretion.

That portion of paragraph 12 which binds the city
page 41] to accept such land as the Authority determines to be reasonably necessary for streets and alleys is invalid for the same reasons stated in dealing with the second sentence of paragraph 11. The general power of cities over streets therein is conferred by Code Sec. 3030. The Housing Authority is created for a specific purpose, and there is not enumerated among its powers the right to determine the location of the city's streets. It therefore has no legislative powers in that respect. It is simply inconsistent with the fundamental concepts of a city as a municipal corporation to say that another political sub-division located within its bounds may dictate as to when and where it shall open, close, pave and otherwise deal with public ways within that city. The statute does not contemplate that such authority or the city shall so deal with the police power of the City. The remainder of paragraph 12 is unobjectionable as it is, in substance, no more than an acknowledgment of the rights which any land-owner retains by law, upon the dedication of streets, Code Sec. 5219.

Again in regard to paragraph 13, if it imposes an unconditional obligation upon the City, it would be invalid for reasons already stated. However, that paragraph provides that

"such facilities shall be furnished and such work performed x x after arrangements have been made for financing x x in such manner as may be agreed upon by the City and the Authority." Thus it is seen that the obligation is conditioned upon the city agreeing upon the necessary financial arrangements, thereby preserving the legislative discretion of the Council. No other specific grounds of attack upon the agreement are set forth, and there is apparently no basis for further objections.

The last ground of attack is that which attacks the validity of the Act in general, and asks a declaratory judgment as to the validity and interpretations of the act, ordinance page 42] and contracts in question. No specific questions, other than those already passed upon are raised; consequently the foregoing opinion disposes of the case; except that there is one remaining question which is incident to the question of public use, and which it is necessary to discuss. The act, in paragraph 8 (d) confers upon the Authority the power "to sell x x transfer x x or dispose of any real x x property or any interest therein." Again in paragraph 14 authorizing the issuance of bonds and securing the payment of same, an authority may "mortgage x x any housing project, projects x x of the authority." Still further in paragraph 16 (b) is conferred the power to "mortgage all or any part of its real x x property then owned or thereafter acquired." Then in paragraph 10 relating to rentals and tenant selection it is provided that "nothing in this or the preceding section "(operating not for profit) "shall be construed as limiting the power of an authority to vest in an obligee the right, in the event of default by the authority, to take possession of a housing project or cause the appointment of a receiver thereof, free from all the restrictions imposed by this or the preceding section."

Are these provisions invalid as empowering the Authority to defeat the public use of its property? It is thought that they do not. We are dealing here with a political sub-division which has no power to tax, and whose only sources of credit are its property and contributions to it. It therefore becomes necessary that it be empowered to mortgage its property in order to secure the funds with which to carry out its purposes. The nearest similar cases are those where municipal corporations, water commissioners, and other public agencies have been held to be authorized to mortgage public property to secure bonds. For a collection of these cases see note in 39 A. L. R. beginning at page 216.

If these provisions of the act under consideration are invalid, the reason is not that the legislature does not possess the ultimate power to direct the disposition of public
page 43] property, *Cooley's Const. Lim.* p. 342, but because even the legislature in dealing with property impressed with a public trust must safeguard the rights of the beneficiaries of that trust, which may be doubtful in the present instance.

A doubt, however, is insufficient, and all doubt must be solved in favor of the constitutionality of the enactment.

Accordingly the demurrers to all portions of the bill which in any manner assail the validity of the Housing Authorities Law be sustained.

The question of the constitutionality of state housing authorities laws has been passed upon by a number of courts. Most of these cases are collected in a footnote by the court to *Allydon Realty Corp. v. Holyoke Housing Authority*, (Mass) 23 N. E. (2d) 665, 669, and a more recent tabulation in *Humphery v. City of Phoenix, et al* (Ariz.) decided May 6, 1940. In all cases, so far as the court has been able to ascertain, such laws have been upheld.

7/19/40

J. L. CANTWELL, JR.,
Judge.

page 44] W. R. Mumpower
vs.

Housing Authority of the City of Bristol and City
of Bristol

It is agreed that the foregoing shall constitute the transcript of record for the purpose of applying for an appeal, this the 30th day of July, 1940.

JONES & WOODWARD,
Attorneys for Complainant
DONALD T. STANT,
Attorney for Housing Authority
FLOYD H. ROBERTS,
Attorney for City of Bristol

The foregoing is approved as the transcript of record for the purpose of applying for an appeal, this August, 1, 1940.

JOS. L. CANTWELL, JR.,
Judge.

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CLERK'S CERTIFICATE

I, Dan Drinkard, Clerk of the Corporation Court of the City of Bristol, do certify that the foregoing is the transcript of record and agreement of parties for the purpose of applying for an appeal in the chancery cause of W. R. Mumpower vs. Housing Authority of City of Bristol and City of Bristol.

This the 31st day of July, 1940.

DAN DRINKARD,
Clerk.

A Copy Teste:

J. M. KELLY,
Deputy Clerk.

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CLERK
SUPREME COURT OF APPEALS

