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DEFENSE, LOCAL COUNTY COUNCIL OF — COUNTY COMMISSIONERS MAY EXPEND MONEYS IN GENERAL REVENUE FUND TO PAY NECESSARY OPERATING EXPENSES, OFFICE SPACE, SUPPLIES — SECTION 5290 GENERAL CODE.

SYLLABUS:

County commissioners may expend moneys in the general revenue fund for the purpose of paying the necessary operating expenses, including office space and supplies, for a local county council of defense, created under and by virtue of the provisions of Section 5290 of the General Code (Sec. 6, Am. S. B. 178; effective 8-19-1941.)

Columbus, Ohio, March 3, 1942.

Honorable Manning D. Webster, Prosecuting Attorney,
Pomeroy, Ohio.

Dear Sir:

I have your request for my opinion reading as follows:

“It will be appreciated if you will give me your opinion on the following:

May the County Commissioners expend money for the purpose of furnishing office space, stationery, supplies and operating expenses for a local county defense council which was created by virtue of Section 5290 of the General Code?”

Like requests have been subsequently received from other prosecuting attorneys of this state.

The “state council of defense act” was passed as Amended Senate Bill No. 178, by the 94th General Assembly, and became effective on August 19, 1941. The act is entitled “An Act — Relating to national and state defense, providing for the establishment of a state council of defense and of local and district councils of defense, and prescribing the powers and duties thereof.” It is codified as Sections 5285 to 5290, inclusive, of the General Code. Sections 5286 to 5289, General Code, make provision for the creation and the powers and duties of the “state council of defense,” while Section 5290 of the General Code provides as follows:

“The governor is authorized and empowered to create by

proclamation local and district councils of defense and prescribe their powers and duties and whenever he deems it expedient may by proclamation dissolve or suspend such councils or reestablish them after any such dissolution or suspension."

Obviously, while Section 5290, *supra*, authorizes and empowers the Governor to "create by proclamation local and district councils of defense and prescribe their powers and duties," there is nothing in this section or any other section of the General Code *expressly* authorizing the expenditure of county funds to carry into effect the legislative will as contained in said Section 5290, *supra*. Notwithstanding this fact, however, I am of the view that county commissioners have the power and authority to appropriate and expend monies in the general revenue fund to make possible necessary activities in connection with state and local defense, and thus effectuate the legislative will as expressed in Amended Senate Bill 178, *supra*.

I am, of course, entirely familiar with the fundamental rule that county commissioners, and like officers, boards and commissions, whose offices, powers, authority and duties are conferred by statute, have such powers, and only such powers, as are expressly given by legislative enactment, together with such implied powers as are necessary to carry the powers expressly granted into effect. See *Jones, Auditor, v. Comms. of Lucas Co.*, 57 O.S. 189, 48 N.E. 882 (1897); *Peter v. Parkinson, Treasurer*, 83 O.S. 36, 93 N.E. 197 (1910); and *The State, ex rel. Locher, Pros. Atty. v. Menning, et al.*, 95 O.S. 97, 115 N.E. 571 (1916). But it seems to me that in the instant case the powers and authority vested in the county commissioners by the Legislature to expend monies in the general revenue fund for the purposes about which you inquire, are within the rule above set forth, and I ground my conclusion upon the several reasons hereinafter given.

In the first place, the act under consideration relates to *state* defense as well as to national defense, and provides for "local and district councils of defense" and the powers and duties thereof.

Ours is a unique form of government. It is a government of one in many and many in one. Not without reason has the legend "E pluribus unum" (from many, one) appeared on our silver dollars since the early eighteen-nineties. That is to say, our government consists of many sovereignties within one sovereignty. As stated by Judge Cooley, at page 4 of his *Constitutional Limitations*:

“ * * * In American constitutional law, * * *, there is a division of the powers of sovereignty between the national and state governments by subjects; the former being possessed of supreme, absolute, and uncontrollable power over certain subjects throughout all the States and Territories, while the states have the like complete power within their respective territorial limits, over other subjects. * * * ”

The principle of law here applicable was well stated by Mr. Justice McLean in the case of *Thurlow v. The State of Massachusetts*, 5 Howard 293, 294, 12 L. Ed. 585, 587, et seq. (1847), in the following words:

“The States, *resting upon their original basis of sovereignty*, subject only to the exceptions stated, exercise their powers over everything connected with their social and internal condition. A state regulates its domestic commerce, contracts, the transmission of estates, real and personal, *and acts upon all internal matters which relate to its moral and political welfare*. Over these subjects the federal government has no power. *They appertain to the state sovereignty as exclusively as powers exclusively delegated appertain to the general government.* * * *

The acknowledged police power of a state extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed. * * * *It is a power essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he be assailed by an assassin, or approached by poison.* * * * ”
(Emphasis mine.)

In connection with the question posed by you, I am not unmindful of the fact that the states of the Union have, inter alia, delegated to the Federal Government, and more particularly to the Congress, the power (1) to declare war; (2) to raise and support armies; (3) to provide and maintain a navy; (4) to make rules for the government and regulation of the land and naval forces; and (5) to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers,” and all other powers vested by the Federal Constitution in the government of the United States, or in any department or offices thereof. (Sec. 8, Art. I, Const., U.S.) Nor am I unaware of the fact that the constitution of the United States “and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.” (Sec. 10, Par. 2, Art. VI, Const. U.S.) The issue as to the supremacy of the Federal government over matters within its proper domain was deter-

mined in the War between the States. That war determined many things, but above all it decided the supremacy of the Government of the United States, where that government acted within its constitutional authority.

Happily, in so far as your inquiry is concerned, I am not confronted with any question or difficulty as to the division of powers. I take official notice that all local defense councils are "clearing" through the state defense council, which is cooperating in every respect with the Federal government and the proper agencies set up by it to meet the present emergency.

To summarize the thoughts heretofore indicated, it is my opinion that while within the powers delegated to it the Federal government is supreme, yet the fact remains that the state of Ohio and the other sovereign states of the Union may take such steps as they deem necessary and proper to preserve themselves especially when cooperating with the National government.

In Montesquieu's *The Spirit of Laws*, first published in 1748, Vol. I, p. 149 (Robert Clarke & Co. Edition, 1875), it is said as follows:

*"To preserve a state in its due force, it must have such an extent, as to admit of a proportion between the celerity with which it may be invaded, and that with which it may defeat the invasion. As an invader may appear on every side, it is requisite that the state should be able to make on every side its defense; * * *"*
(Emphasis mine.)

See also Holland on Jurisprudence (12th Ed.), page 394, where it is said:

"The right of a state to exist in safety calls for no remark. Its violation or threatened violation gives use to the remedial right of self preservation."

And at page 298 the same authority reads:

*"A state is not only entitled to the immunity from injury of its territory and of all persons therein, but may also insist that its subjects individually, wherever they may be, shall receive no harm from foreign governments or their subjects. * * *"*

Clearly, then, the state of Ohio has the power and authority, and even the duty, in view of the exigencies of the times, to take all proper

steps to preserve its sovereignty, to prevent encroachments upon its territory, and above all, to protect its people, so long as it does not act in opposition to the supreme law of the land as enacted or declared by the duly constituted Federal authority. And it seems to me that what the state may do in this respect, its political subdivisions may do in time of war, when authorized by an act of the Legislature.

But it is unnecessary to base my conclusion upon the above reasoning alone. A county is but a subdivision of the state. That is to say, a county is a mere political organization of certain of the territory within the state, particularly defined by geographical limits. "Counties" existed before Ohio became a state, having been in existence in England from the earliest time. Their existence was recognized in the Ordinance of 1787, in which the Governor of the Northwest Territory was directed "to lay out the parts of the district in which the Indian titles shall have been extinguished, into *counties* and townships, subject, however, to such alterations as may thereafter be made by the legislature." (Ordinance, 1787, Sec. 8). Our Constitution did not create the counties, but recognized them as existing subdivisions of the state. See 11 O. Jur. 238, et seq. And since counties are but geographical or territorial subdivisions of the state, no sound reason presents itself why the state may not only make due efforts to preserve itself along state lines, but may also accomplish the same end by using the resources of its local subdivisions as well. This, manifestly, is what the General Assembly did by the enactment of Section 5290, supra.

As early as 1865, it was said by Judge Welch in the case of *Carder v. Board of Comms. of Fayette County*, 16 O.S. 353, 369, that while in one sense the county commissioners are the agents of the county, "in another sense they are the *county itself*," and that in certain capacities "they not only act *for* the county, but also act *as* the county." And it was further said that the "county, and the commissioners of the county, are often convertible terms." See also *Nearing, et al., v. The Toledo Electric Street Railway Company*, 9 O.C.C. 596, 6 O.C.D. 664 (1893).

Now, certainly the Legislature intended something when it enacted Amended Senate Bill No. 178, and included therein Section 6, codified as Section 5290, General Code, as above set forth. It is not to be presumed that the Legislature does a vain and idle thing, and when the creation and organization of local councils of defense were authorized, the power and authority to expend public funds to cover the necessary expenses to

enable such councils to function must of necessity be implied. Otherwise, Section 5290, supra, is meaningless or at least substantially so. As stated in 37 O. Jur. 615:

“ * * * An interpretation should, if possible, be avoided, under which the statute or section or any part thereof is nullified, or, as otherwise expressed, defeated, abrogated, rendered useless, idle, needless, unnecessary, vain, nugatory, inoperative, void, meaningless, or, in general, without effect or significance. * * * ”

Moreover, county commissioners are required to construct, provide and maintain county property. For example, by Section 2419, General Code, they are required, within their discretion, to provide a court house, jail, public comfort station, offices for county officers and an infirmary as well as “all room(s), fire and burglar-proof vaults and safes and other means of security in the office of the county treasurer, necessary for the protection of public moneys and property therein.” By the terms of Section 2421, General Code, it is their duty “to construct and keep in repair necessary bridges” over certain streams. Section 2422, General Code, provides that the commissioners “shall construct and keep in repair, approaches or ways to all bridges” named in Section 2421, supra. They have certain duties with reference to straightening water courses (Section 2427-1, et seq., General Code). Under the provisions of Section 7464 et seq. of the General Code, county commissioners are authorized and required to construct, maintain and keep in repair roads in the county system of highways. In addition they may acquire airports and landing fields (Section 2433-2, General Code) and many other types of property. And of course it goes without saying that such officials have many duties with reference to the peace, safety and welfare of the people of the county. These facts being true, it would seem necessarily to follow that, in time of war they may expend public funds to prevent injuries to persons, by way of riot or otherwise, and damage to county property by sabotage, bombings or direct attack before such injuries or damage occurs, as well as to use public funds after the grief has been suffered. Quite obviously a Yale lock on the barn does little good after our favorite steed has been stolen.

While I in nowise maintain that the fact that we are at war suspends or changes the law of the land, the excerpt from the case of Ware, Administrator of Jones, v. Hylton, et al., 3 Dallas, 199, 1 L.Ed. 568, 582

(1796), as quoted in Opinion No. 4713, rendered by me under date of January 10, 1942, is pertinent. In that opinion I held as stated in the first branch of the syllabus:

“The legislative authority of municipalities in Ohio may appropriate and expend funds from the general fund of such municipalities for the payment of the necessary expenses of local defense councils, including necessary expenses of local defense councils, including necessary traveling expenses and other expenses necessary to enable such local defense councils to function, as provided for in Section 5290 of the General Code.”

The excerpt in question reads as follows:

“It has been enquired what powers Congress possessed from the first meeting, in September, 1774, until the ratification of the articles of confederation, on the first of March, 1781? It appears to me, that the powers of Congress, during that whole period, were derived from the people they represented, expressly given, through the medium of their state conventions, or state Legislatures; or that after they were exercised they were impliedly ratified by the acquiescence and obedience of the people. * * * The powers of Congress originated from necessity, and arose out of, and were only limited by, events; or, in other words, they were revolutionary in their nature. Their extent depended on the exigencies and necessities of public affairs. It was absolutely and indispensably necessary that Congress should possess the power of conducting the war against Great Britain, and therefore if not expressly given by all (as it was by some of the states) I do not hesitate to say, that Congress did rightfully possess such power. * * *”

In conclusion, I feel constrained to add that the holding of this opinion is not without historic precedents, for in most, if not in all our wars, public moneys of the state and its subdivisions have been expended for national, *state* and *local* defense.

For the foregoing reasons and in specific answer to your question, it is my opinion that:

County commissioners may expend moneys in the general revenue fund for the purpose of paying the necessary operating expenses, including office space and supplies, for a local county council of defense, created under and by virtue of the provisions of Section 5290 of the General Code (Sec. 6, Am. S.B. 178; effective 8-19-1941.)

Respectfully,

THOMAS J. HERBERT

Attorney General.