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1. DEFENSE COUNCILS, LOCAL — TRAVELING AND NECESSARY EXPENSES TO FUNCTION — MUNICIPALITIES, THROUGH LEGISLATIVE AUTHORITY, MAY APPROPRIATE AND EXPEND FUNDS FROM GENERAL REVENUE FUND FOR PAYMENT — SECTION 5290 GENERAL CODE.
2. EXPENSES, HOUSING, LIGHT, HEAT AND MATERIALS — PAID FROM GENERAL FUND BY APPROPRIATION — PURCHASE, MATERIAL TO KNIT GARMENTS, QUESTION OF FACT, DETERMINED BY PROPOSED USE OF GARMENTS.

## SYLLABUS:

1. 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 traveling expenses and other expenses necessary to enable such local defense councils to function, as provided for in Section 5290 of the General Code.

2. Expenses to cover the furnishing of housing, light, heat and the necessary materials to enable a local defense council properly to perform its duties are proper expenditures to be paid from the general fund upon the appropriation by the proper legislative body of the municipality. Whether or not moneys may be used to purchase material for knitting garments is a question of fact to be determined from the purpose to which such garments are to be put.

Columbus, Ohio, January 10, 1942.

Bureau of Inspection and Supervision of Public Offices,  
Columbus, Ohio.

Gentlemen:

I have your recent request for my opinion, which reads as follows:

“We have been receiving numerous inquiries concerning the authority of local subdivisions, cities and villages, to appropriate public funds for the payment of incidental expenses incurred by local Defense Councils, as created or approved by the Government, pursuant to the provisions of Am. Sen. Bill No. 178, enacted by the 94th General Assembly.

One of these inquiries relates to the payment of expenses of members of the local Defense Council to a defense school to be held in Columbus in the near future.

As this matter is of state-wide concern, may we request your formal opinion in answer to the following questions:

Question 1. May the legislative authority of cities and villages appropriate within the general fund for the payment of

traveling and incidental expenses of local Defense Councils created under authority of Am. Sen. Bill No. 178, 94th General Assembly?

Question 2. If the answer to question No. 1 is in the affirmative, is a definition available concerning the nature of incidental expenses that may be incurred against public funds of such subdivisions, it being the intention of one village to furnish housing, light, heat, etc., for the Defense Council, including material for knitting garments, etc.?

Thank you for an early consideration of and reply to these questions."

What is denominated the "state council of defense act," passed in Amended Senate Bill No. 178, by the 94th General Assembly, on May 12, 1941, and effective on August 19, 1941, 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." The act 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, 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."

It will be noted that 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 "state defense act" expressly authorizing the expenditure of municipal funds to carry into effect the legislative will as contained in said Section 5290. Notwithstanding this fact, however, I am of the view that the proper legislative body of any municipality in this state has the power and authority to appropriate and expend such funds in the general revenue fund as it deems proper for the purpose of carrying out such activities in connection with local defense as coincide with the functions of local self government.

The powers of local self government under the Home Rule Amendment of 1912 have been rather clearly defined and determined by our Supreme Court. By the terms of Section 3, Article XVIII of the Constitution, municipalities are empowered "to exercise all powers of local self government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with

general laws.” Section 7 of the same article authorizes any municipality to frame or adopt or to amend a charter for its government and, subject to the provisions of Section 3, to “exercise thereunder all powers of local self-government.” In addition to the limitations contained in Section 3 of Article XVIII, supra, Section 6 of Article XIII and Section 13 of Article XVIII provide that the General Assembly may restrict municipalities’ power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power, it being further provided that reports may be required “from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.”

With reference to the nature, scope and extent of the powers of municipalities under our present Constitution, the law is well stated in 28 O.Jur. 242, et seq., citing inter alia *State ex rel Toledo v. Lynch*, 88 O.S. 71, 102 N.E. 670, 48 L.R.A. (N.S.) 720 (1913); *Fitzgerald et al., etc., v. City of Cleveland*, 88 O.S. 338, 103 N.E. 512 (1913); *State ex rel Morgan vs. Rush, etc.*, 37 Oh. App. 109, 174 N.E. 142 (1930); and *City of Mansfield v. Endly*, 38 O. App. 529, 176 N.E. 462 (1931; *Aff’d* 124 O.S. 652), in the following words:

“The powers of local self government ‘are clearly such as involve the exercise of the functions of government, and they are local in the sense that they relate to the municipal affairs of the particular municipality.’ \* \* \*

The powers of local self-government conferred upon municipalities by article 18 (sic) of the Constitution are limited to such governmental powers as might be exercised by the state itself. On the other hand, such powers extend to and include all those which might be exercised by the state itself, through the legislature, within the proper domain of municipal government.” \* \* \*

In the *Morgan* case, supra (37 Oh. App. 109), the first headnote reads:

“City of Cleveland has within its proper domain same powers that Legislature would have to pass private bills or do anything Legislature might do.”

While it is rather difficult to justify the opinion in the *Morgan* case in all respects and some of the statements therein contained, yet the court did say, and it seems to me to be the law (p.111):

“If we understand the nature of the charter of the City of Cleveland it has within its proper domains the same power that

the Ohio Legislature would have to pass private bills, or to do anything that the Legislature might do. \* \* \*

A more helpful opinion is that of Judge Sherick, in the case of Mansfield v. Endly, supra, in which, at page 535 of 38 Ohio Appellate, it is said:

“By the expression, ‘to exercise all powers of local self government,’ we hold it to be understood that a municipal corporation may enact all such measures as pertain exclusively to it, in which the people of the state at large have no interest or concern, and which they have not expressly withheld by constitutional provision. \* \* \*

Two recent cases decided by the Supreme Court of Ohio containing an excellent exposition of the Home Rule Powers of municipal corporations, are state ex rel. Strain, Dir. Dept. of Indus. Relations v. Houston, Chief of Fire Dept. of City of Cincinnati, 138 O.S. 203, 20 O.O. 265 (1941), and City of Cincinnati et al v. Gamble et al., etc., 138 O.S. 220, 20 O.O. 273 (1941), the 2nd branch of the syllabus in the Houston case reading as follows:

“Power is granted to municipal corporations to legislate in the interest of public peace and the protection of persons and property within their territorial limits, but such legislation must not conflict with state legislation on the same subject, and there is reserved to the Legislature power to direct the manner and method by which municipal corporations shall effectively carry out their functions having to do with the preservation of the peace and the protection of persons and property.”

while in the Gamble case the 1st branch of the syllabus reads:

“By virtue of Sections 3 and 7 of Article XVIII of the Constitution, a municipality, irrespective of whether it has adopted a charter, has powers of local self-government and may adopt and enforce within its limits such local police, sanitary and other similar regulations as are not in conflict with general law.”

Not only is there no statute regulating or prohibiting the expenditure of public funds for the purposes contemplated in Section 5290, supra, but the necessary implication is that by the very enactment of such section it was the intention and the purpose of the Legislature that public funds might be used to cover the expense of local defense activities.

Among the many matters which the state council is authorized to supervise and to take other appropriate action thereon as set forth in Section 5288, General Code, are:

- “ \* \* \* (1) Industrial materials and facilities.  
 (2) Production and manufacturing facilities.  
 (3) Agriculture, food supply, and land use.

- (4) Transportation facilities.
- (5) Labor supply and training, labor relations, and human resources, professions, trades, and skills.
- (6) Consumers and consumer protection.
- (7) Housing and related facilities.
- (8) Health, hospitals, and sanitation facilities.
- (9) Welfare.
- (10) Educational facilities.
- (11) Recreational areas and facilities.
- (12) Finance.
- (13) Civil liberties, including but without limitation, the protection thereof, maintenance of law and order, and measures to guard against sabotage and subversive activities.
- (14) Civil defense, including police mobilization, coordination for fire protection, and disaster relief.
- (15) Any other type of activity directly or indirectly related to defense. \* \* \*

Clearly, most if not all of the subjects enumerated are matters of local self government. For example, in view of the freezing of the sale of tires and automobiles for private use, the question of transportation facilities will undoubtedly become a matter of major importance. Likewise, health, hospitals, sanitation facilities and welfare generally are of extreme importance in so far as local self government is concerned, and of course maintenance of law and order, the adoption of measures to guard against sabotage and subversive activities, police mobilization, coordination for fire protection and disaster relief are so patently governmental functions in which municipalities have a direct interest, that their mere mention conclusively demonstrates the interest of the local self governments.

I am informed that the Governor of Ohio has issued proclamations creating more than 500 local defense councils in the various municipalities of the state. These proclamations are in the following form.

“Dear Mayor———:

I have your letter and form letter of —— relative to the establishment of a Local Defense Council in your community.

Pursuant to Section 6 of Amended Senate Bill 178, 94th General Assembly of Ohio, I hereby proclaim and certify the organization designated by you as a Local Council of Defense in the State of Ohio.

If necessary and practicable, additional representation may be provided to meet the defense needs of your community. All changes or additions, however, should be submitted to the Ohio State Council of Defense for approval before being made effective.”

You will observe that these proclamations do not prescribe the powers and duties of the local defense council, although it is stated that if necessary and practicable additional representation may be provided to meet the defense needs of the several communities. It is, of course, to be presumed that both the Governor and the local authorities will confine the activities of local defense councils to those governmental functions which properly lie within the domain of local self government. One of the strongest presumptions known to the law is that public officials have performed and will properly and lawfully perform their duties.

Moreover, I cannot but be mindful of the fact that this country, the several states and territories of the Union and the local subdivisions thereof are in a state of national emergency, and in this connection the remarks of Mr. Justice Chase, in the case of *Ware, Administrator of Jones, v. Hylton, et al.*, 3 Dallas, 199, 1 L.Ed. 568, 582 (1796), are pertinent. In this opinion it was said 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. \* \* \*”

Like conclusions to those herein reached were expressed by the Attorney General of California in Opinion No. 1033, dated October 29, 1940. In that opinion it was held as follows (quoted from reports of the Attorneys-General Section for the National Association of Attorneys-General):

“Until and unless legislative sanction therefor is given, cities and counties have no power to expend public funds or employ personnel in the formation of local defense councils. The establishment of such a council pending legislative sanction would have to be purely on an unofficial and informal basis. If any activities contemplated for local councils of defense are found, however, to coincide with functions of local government, such activities may be performed by the appropriate existing

agency within whose authority they fall. And in those counties where specific authority has been given by county charter to create boards or commissions additional to those required by the Constitution and the general laws of the State, these activities, in so far as they constitute county functions, may be performed not only through existing boards and offices, but through agencies set up especially for that purpose. Likewise, where a municipal charter contains specific authority to create offices additional to those required by the Constitution or general laws, those defense activities which may properly be said to constitute municipal affairs may be performed either through existing boards or through special agencies created for that purpose."

In view of the foregoing, I am constrained to hold that your first question must be answered in the affirmative.

In so far as your second question is concerned, I deem it impracticable, if not impossible, to give any definition or lay down any hard and fast rule concerning the nature of incidental expense that may be incurred against public funds of municipalities. Certainly expending funds for the purpose of furnishing housing, light, heat and materials to enable the local defense council to function would be proper expenditures. In so far as purchasing materials for knitting garments is concerned, I am of the opinion that the answer depends upon the purpose for which such garments are to be put. If they are to be used by local fire wardens, firemen, police officers, guards and persons occupied in similar positions, I am of the opinion that such an expenditure would be proper. On the other hand, I am inclined to question the right of a municipality to purchase material for knitting garments to be indiscriminately distributed.

In view of the foregoing, and for the reasons and upon the authorities cited, it is my opinion that:

1. 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 traveling expenses and other expenses necessary to enable such local defense councils to function, as provided for in Section 5290 of the General Code.

2. Expenses to cover the furnishing of housing, light, heat and the necessary materials to enable a local defense council properly to perform its duties are proper expenditures to be paid from the general fund upon the appropriation by the proper legislative body of the municipal-

ity. Whether or not moneys may be used to purchase material for knitting garments is a question of fact to be determined from the purpose to which such garments are to be put.

Respectfully,

THOMAS J. HERBERT  
Attorney General.