COUNTY COURTS: May expend funds for National Defense.

January 16, 1942

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Honorable Forrest Smith
State Auditor
Capitol Building
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of January 14, 1942, as follows:

> "I respectfully request the official opinion of your office on the following questions:
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> "(1) Do the various county courts in the State have authority to include in their budgets, for 1942, prospective expenditures for National Defense activities to be carried out within the county under the direction of the State Council of Defense, organized under Laws of Missouri, 1941, page 669?
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> "(2) If the above question is answered in the affirmative, how should the items be set up in the budget, and to whom and in what manner should these funds be disbursed by the county court?"

Both Federal and State Governments have recognized the existence of the national emergency which has arisen within the past few months. The first recognition by the Federal Government is found in the proclamation by our President, under date of May 27, 1941, which is as follows:

"Proc. No. 2487. Unlimited National Emergency.

"Proc. No. 2487, May 27, 1941, 6 Fed. Reg. 2617, 55 Stat. -- is set out below:

"WHEREAS on September 8, 1939 because of the outbreak of war in Europe a proclamation was issued declaring a limited national emergency and directing measures 'for the purpose of strengthening our national defense within the limits of peacetime authorizations',

"WHEREAS a succession of events makes plain that the objectives of the Axis belligerents in such war are not confined to those avowed at its commencement, but include overthrow throughout the world of existing democratic order, and a worldwide domination of peoples and economies through the destruction of all resistance on land and sea and in the air, AND

"WHEREAS indifference on the part of the United States to the increasing menace would be perilous, and common prudence requires that for the security of this nation and of this hemisphere we should pass from peacetime authorizations of military strength to such a basis as will enable us to cope instantly and decisively with any attempt at hostile encirclement of this hemisphere, or the establishment of any base for aggression against it, as well as to repel the threat of predatory incursion by foreign agents into our territory and society.

"NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America,

do proclaim that an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere.

"I call upon all the loyal citizens engaged in production for defense to give precedence to the needs of the nation to the end that a system of government that makes private enterprize possible may survive.

"I call upon all our loyal workmen as well as employers to merge their lesser differences in the larger effort to insure the survival of the only kind of government which recognizes the rights of labor or of capital.

"I call upon loyal state and local leaders and officials to cooperate with the civilian defense agencies of the United States to assure our internal security against foreign directed subversion and to put every community in order for maximum productive effort and minimum of waste and unnecessary frictions.

"I call upon all loyal citizens to place the nation's needs first in mind and in action to the end that we may mobilize and have ready for instant defensive use all of the physical powers, all of the moral strength and all of the material resources of this nation."

The Missouri State Legislature, in recognition of this unlimited state of emergency, passed House Bill No. 540 creating a State Council of Defense, found in Laws of Missouri, 1941, at page 669, as follows:

"Section 1. Citation of the Act. -- This Act may be cited as the 'State Council of Defense Act.'

"Section 2. Defense Council may be created -- by whom. -- The Governor is hereby authorized and empowered in time of emergency or public need in the Nation or the State to create by proclamation a State Council of Defense hereinafter designated as the 'Council', for the general purpose of assisting in the coordination of the State and local activities related to National and State defense. Whenever he deems it expedient, the Governor may, by proclamation, dissolve or suspend such Council or reestablish it after any such dissolution or suspension.

"Section 3. Membership of Council -- by whom appointed, qualifications. -- (a) The Council shall consist of not less than fifteen members appointed by and holding office during the pleasure of the Governor. The Governor shall serve as chairman of the Council. He shall designate one of the members of the Council as vice-chairman. Appointment of members shall be made without reference to political affiliation and with reference to their special knowledge of industry, agriculture, consumer protection, labor, education, health, welfare, or other subjects relating to National or State defense.

"Section 4. Emergency. -- Because of existing world conditions and the necessity for the complete coordination of all state and local activities in connection with national defense, it is hereby declared that an emergency exists

> within the meaning of the Constitution, therefore, this Act shall be in full force and effect from and after its passage and approval."

Particular attention is directed to the purpose of the State Council of Defense, as declared in Section 2, supra. Pursuant to the existing state of emergency, the Governor of the State, Forrest C. Donnell, has organized by proclamation a State Council of Defense "for the general purpose of assisting in the coordination of the state and local activities related to national and state defense."

Under the first question presented, it is necessary to consider whether the county court of any county within the state may lawfully expend money for defense purposes since such items should not be included in the budget unless expenditure is lawful.

Broad powers are vested in the respective county courts of the state by Section 36, Article VI, of the Missouri Constitution, which provides:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

The trend of the decisions of our Supreme Court has favored the enlargement of the powers of the county court, which were, in some of the older cases, restricted to authority found in the statutes which were strictly construed. In Rinehart v. Howell County, 153 S. W. (2d) 381, which involved the grant of moneys for stenographer hire to a prosecuting attorney where there was no authority for such expenditures in the statute, we find the following (l. c. 383):

> "Our Constitution, Art. 6, Sec. 36, Mo. St. Ann., provides: 'In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law.' In State ex rel. v. McElroy, 309 Mo. 595, 608(II), 274 S. W. 749, 751 (1), we construed said provision to authorize county courts to transact all county business and such other business as may be added to their jurisdiction by law."

Later in the opinion, the court, in commenting on the fact that the statutes provided for stenographers for prosecuting attorneys in certain counties, while there was a complete absence of such statutes in other instances, further said (l. c. 383):

> "Such enactments, in view of the constitutional grant to county courts, should be construed as relieving the county courts in the specified communities from determining the necessity therefor and, by way of a negative pregnant, as recognizing the right of county courts to provide stenographic services to prosecuting attorneys in other counties when and if indispensable to the transaction of the business of the county, and not as favoring the citizens of the larger communities to the absolute exclusion of the citizens of the smaller communities in the prosecuting attorney's protection of the interests of the state, the county and the public." (Underscoring ours)

Briefly stated, under this decision the county court has full power in connection with the expenditure of county moneys except as limited by the Constitution

or statutes. This position is supported by the following quotation from 15 C. J., Section 288.

> "In the absence of statutory provisions on the subject, there would seem to be no doubt that county boards as the fiscal agents of their counties may direct the disposition of the county revenues, and where the power and the duty to determine how the revenues shall be expended is expressly imposed by law on the county board, the courts will not interfere with its discretion, in the absence of proof of fraud or gross abuse of power, the power of the board to expend funds not being confined strictly to claims enumerated in the statutes."

The Constitution limits expenditures of moneys collected by taxation. Section 3, Article X states in part:

> "Taxes for public purposes only -- must be uniform. -- Taxes may be levied and collected for public purposes only. * * * * "

Section 44, Article IV, of the Constitution prohibits the granting of credit or public moneys to private individuals, associations or corporations.

That expenditures of money for the preservation of the lives and property of the citizens of any county from attack or invasion by a common enemy would be for a "public purpose" seems too obvious to require authority. Furthermore, we find that the county court is specifically charged with the duty of preserving all buildings and property of the county from waste or damage. Section 13730, Revised Statutes of Missouri, 1939, is in part as follows:

> "The county court of each county shall have power, from time to time, to alter, repair or build any county buildings * * * ; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage."

On other occasions our courts have broadly interpreted constitutional provisions and statutes to cover situations brought about by conditions which did not exist when such constitutional provisions or statutes were created. In Dysart v. City of St. Louis, et al., 11 S. W. (2d) 1045, the facts disclose that the city was in the process of building a municipal airport, and an election was held authorizing the issuance of bonds to pay for the construction of the airport. An injunction suit was brought to prevent the issuance of the bonds, it being alleged that the money would not be spent for a public purpose and that the charter of the City of St. Louis did not authorize the construction of an airport. The court, in overruling these contentions, stated (l. c. 1048, 1049):

> "'The question of whether the acquisition and control of a municipal airport is a public purpose within the purview of the constitutional principle heretofore adverted to is obviously a new one. The courts which have had occasion to consider it have, however, answered in the affirmative. City of Wichita v. Clapp, supra; State ex rel. City of Lincoln v. Johnson, State Auditor (Neb. 1928) 220 N. W. 273; State ex rel. Hile v. City of Cleveland et al. (Ohio Ct. App. 1927) 160 N. E. 241; and no court of last resort, so far as we are advised, has ever held the contrary. Not only that, but the governmental nature of the function involved is given tacit recognition in numerous recent statutory enactments, both state and federal;

> Laws of Georgia 1927, p. 779; R. S. Kansas 1923, 3--110; Public Acts Conn. 1925, ch. 249; Laws of Mass. 1922, ch. 534, sec. 57; Laws of Mont. 1927, ch. 20; General Code of Ohio, par. 15, sec. 3677; Pa. Act No. 328 of 1925 (Pa. St. Supp. 1928, secs. 4606--1 to 4606--3); Act 254 of the 69th Congress (the Federal Air Act (49 USCA, section 171 et seq.)) We have no doubt as to the soundness of the view which obtains.'
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> "'The point is suggested, but not pressed, that the power to establish and maintain an airport is not within those granted the City of St. Louis by its charter. While there is no specific reference to an airport in the charter, there can be no doubt but that the power in question is expressly conferred by the broad all-comprehensive language employed in the granting of powers, when construed conformably to the rule of construction which the charter itself provides. St. Louis Charter, art. I, sec. 1, paragraphs 8, 15, 32, 33 and 35; art. I, sec. 2. See also, St. Louis v. Baskowitz, 273 Mo. 543, 201 S. W. 870; Halbruegger v. City of St. Louis, 302 Mo. 573, 262 S. W. 379.'"

In another instance, our Supreme Court has, by judicial interpretation expanded the powers of local authorities. In Jennings v. City of St. Louis, 332 Mo. 173, 58 S. W. (2d) 979, an injunction suit was brought to prevent the selling and delivering of bonds to care for paupers, children and the sick, aged and insane. The language used by the court in holding the issuance

of said bonds a proper governmental function is so nearly applicable to the case at hand that we quote from the opinion at length (l. c. Mo. 179, 180, 181):

> "The Supreme Court of Pennsylvania directly passed on this question in the recent case of commonwealth v. Liveright, 161 Atl. 697, l.
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> "'We again l[illegible] the support of the poor -- mea[illegible] persons as have been understood [illegible] within that class ever since [illegible]zation of the Government, perso[illegible]e without means of support, th[illegible]sons stated in the . . . Bill . . . .[illegible]nd has always been a direct charge on the body politic for its own preservation and protection; and that as such, in the light of an expense, stands exactly in the same position as the preservation of law and order. The expenditure of money by the state for such purposes is in performance of a governmental function or duty, and is not controlled by the constitutional provision, if the purpose is to supply food and shelter to the poor, including those who are destitute because of enforced unemployment, provided only that the money be not administered through forbidden channels. The appropriation in providing for relief of poor comprehended those who had been driven into that situation through enforced unemployment; they having no means to support themselves. From this cause the ranks of the poor had increased so rapidly as to stagger the people of our state. The fact that their numbers are swollen through unemployment does not change the established concept of poor persons. <u>To hold that the state may not under the Constitution now aid such people, even though it had a governmental</u>

duty, would be to deny to the state the right to perform, not only an important, but at this time a most pressing, governmental function. To hold that the state cannot or must not aid its poor would strip the state of a means of self-preservation and might conceive untold hardships and difficulties for the future.'

"The Supreme Court of the State of Washington, Rummens v. Evans, 13 Pac. (2d) 26, l. c. 30, said:

"'Under our statutes and decision, therefore, it being a positive governmental function and duty of the country to care for the poor, the statute emphasized by appellant does not govern.'

"The court also said:

"'Unquestionably, in the stress of these times, when unemployment is the rule rather than the exception and has increased immeasurably, in this state and region, within the last two years, an emergency exists under Sec. 3997-6, supra.'

"The opinion closes with these words:

"'Upon the plainest dictates of humanity, such a condition must be relieved immediately or in many hundreds of cases it may be too late or useless. . . . While the funds could be accumulated, as suggested by appellants, thousands of men, women and children might die or be driven to crime to relieve their necessities, or to reprisal and disorder.'

* *

"We, therefore, hold that the ordinances authorizing the issuance of these bonds are for a'public purpose.' They undertake to provide relief for people of the city of St.

> Louis who are unable to care for themselves, and to relieve them of their condition, and it is immaterial what caused their condition." (Underscoring ours)

Protection against a foreign enemy is, under these circumstances, no less a governmental function than protection against the hardships of hunger and unemployment. The Legislature unquestionably contemplated that local authorities would support the national effort for the common defense because the avowed purpose of the enactment of the statute creating the State Council of Defense was to coordinate efforts of the "state and local" authorities. It doubtless believed that the authority already existed in favor of local authorities to exert efforts for the common defense.

There appears to have been but one limitation on the definition of a "public purpose" if all the elements above set out are present. The benefits must be derived by the inhabitants of the governmental unit involved. In State ex rel. City of Jefferson v. Smith, 154 S. W. (2d) 101, Judge Gantt clearly expressed this rule in the following language taken from the opinion (l. c. 103):

> "In this connection we quoted with approval from 26 R. C. L. 46, as follows:
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> "'It may * * * be conceded that that is a public purpose from the attainment of which will flow some benefit or convenience to the public. In this latter case, however, the benefit or convenience must be direct and immediate from the purpose, and not collateral, remote or consequential. It must be a benefit or convenience which each citizen of the community affected may lay his own land to in his own right, and take into his own use at his own option, upon the same reasonable terms and conditions as any other citizen

thereof.' Dysart v. St. Louis, 321 Mo. 514, 11 S. W. 2d 1045, loc. cit. 1047, 62 A. L. R. 762."

It is therefore the opinion of this office that county courts have authority to expend moneys within the geographical limits of their respective counties for the purpose of preserving the lives, property and general welfare of the citizens of the county and for the protection of the property of the counties against invasion or damage by a common enemy.

The next question concerns the manner in which expenditures for defense are to be classified in the budget and how they are to be disbursed.

Section 10911, having been amended by the Sixty-First General Assembly, appears on page 650 of Laws of Missouri, 1941, and is as follows:

"Classification of proposed expenditures. -- The court shall classify proposed expenditures in the following order:

"Class 1. The County court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes.

"Class 2. Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this law. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1.

"In estimating the amount required in class 2 the county court shall set aside and apportion in the budget a sum not less for even years than the sum actually expended in the last even numbered year and for odd years an amount not less than the amount that was actually expended during the last preceding odd numbered year.

"Class 3. The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or construction of bridges and roads on other than state highways (and not in any special road district). The funds set aside and apportioned in this class shall be made from the anticipated revenue to be derived from the levies made under Sections 8526 and 8527 R. S. Mo. 1939. This shall constitute the third obligation of the county.

"Class 4. The county court shall next set asidethe amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendable nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six.

"Class 5. The county court shall next set aside a fund for the contingent and emergency expense of the county, the court may transfer any surplus funds from classes 1, 2, 3, 4 to class 5 to be used as contingent and emergency expense. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified.

> No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes.
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> "Class 6. After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose: Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six: Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

From an examination of this statute, it appears that expenditures for defense such as contemplated herein, should be classified under Class 5 as emergency expense of the county. We find the following definitions of "emergency" in Words and Phrases, Volume 14, l. c. 307:

> "The word 'emergency' is defined in Cent. Dict. as follows: '(2) A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances. (3) A sudden or unexpected occasion for action; exigency; pressing necessity.' United States v. Sheridan-Kirk Contract Co., 149 F. 809, 814.
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> "'Emergency' in statute authorizing members of board of supervisors to make emergency expenditures is unforeseen occurrence

> or combination of circumstances calling for immediate action (Code 1930, sec. 6064). Attala County v. Mississippi Tractor & Equipment Co., 139 So. 628, 162 Miss. 564.
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> "'Emergencies,' as used in cases permitting employee to recover where he has performed some act in an emergency, have been interpreted as unforeseen events happening in and about the premises which threaten or menace life, limb, or destruction of property. Davis v. North State Veneer Corporation, 156 S. E. 859, 861, 200 N. C. 263."

We are, of course, unable to find any direct authority as to the language to be used in setting up such items in the budget, but it is our opinion that the following language would be sufficient:

> "For defense expenditures within the county, to be disbursed under the direction of the State Council for Defense."

In passing, we call your attention to the provision under Class 4, which requires that furniture and office machines and equipment of all kinds must be listed under Class 6, and if any such expenditures are contemplated as a part of the defense effort, they should be listed under Class 6 and not under Class 5, as above suggested. Warrants against funds to the credit of the item for defense should be drawn in the usual manner by the court after consideration of the certificate of the duly authorized agent of the State Council of Defense properly submitted to the county court for that purpose.

Respectfully submitted,

APPROVED:

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Assistant Attorney General

ROY McKITTRICK
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RLH:VC