

APPROPRIATIONS:

STATE COUNCIL OF DEFENSE:

Appropriation to Council of Defense to be expended by council acting in a body in its official capacity. Division of Civil Defense cannot expend balance of appropriation to State Council of Defense.

February 28, 1951 3/1/51

Mr. Ralph W. Hammond
Director,
Office of Civil Defense
Jefferson City, Missouri



Dear Sir:

We are in receipt of your recent letter requesting an official opinion of this department, which letter reads in part as follows:

"I would like very much to request an official opinion on an appropriation matter now pending before the Legislature. As you are aware, the Emergency Appropriations Bill for state departments for the period, 1 January to 30 June, 1951, known as House Bill #1, has been passed by the House of Representatives and is now pending in the Senate. This bill contains an appropriation of \$75,000.00 for the State Council of Defense, for use in establishing a state-wide Civil Defense Program. Also pending in the Senate is Senate Bill #66, an enabling act creating a Division of Civil Defense.

"I would like your opinion as to whether any monies appropriated to the State Council of Defense by House Bill #1 could be expended, should a Division of Civil Defense be created prior to 30 June, 1951. For that matter, does my appointment by the Governor as Chairman of the State Council of Defense enable me to expend money duly appropriated for the State Office of Civil Defense, including funds for equipment, salaries, and supplies. In the event that I may obligate such funds under

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existing statutes (26.100, 26.110, and 26.120--Revised Statutes of Missouri 1949), would I be able to utilize any unexpended balance, should Senate Bill #66 be passed, creating a Division of Civil Defense.* * *"

I.

As we interpret your opinion request, the first question to be answered is whether or not you, by virtue of your appointment by the Governor as Chairman of the State Council of Defense, are authorized to expend funds appropriated by the Legislature for the use of the State Council of Defense.

Section 2 of House Bill No. 1 of the present, the 66th General Assembly, reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Seventy-five Thousand Dollars (\$75,000.00) or so much thereof as may be necessary, for the use of the State Council of Defense, created by Act of the General Assembly (Laws 1941, Page 669), to pay the expenses of civilian defense, including salaries, wages, postage, rent, telegraph, telephone, express, freight, traveling expenses, stenographers, janitors, cost of supplies for emergency Medical Service, Fire Protection, Police, Air Raid Wardens, Emergency Public Utilities, Industrial Plant and Personnel Protection, Air Raid Warning Service, Aircraft Warning Service, purchase of films, purchase and rental of motor car equipment, office equipment, printing, stationery, Federal Old-Age and Survivors Insurance, and for all other purposes necessary to the operation of the State Council of Defense and its services for the period beginning January 3, 1951 and ending June 30, 1951."

Sections 26.110 and 26.120, RSMo. 1949, are the only statutory provisions providing for and regarding the State Council of Defense. Section 26.110 provides:

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"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 26.120 provides:

"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."

In the first place, Section 26.120, supra, expressly and specifically provides that "the governor shall serve as chairman of the council." The legislature has imposed this duty upon the governor and has in no way provided for or authorized the delegation of this duty to another by the governor. In view of this, it must be concluded that you cannot legally act as Chairman of the State Council of Defense.

The governor is authorized by the State Council of Defense Act to create the council and also to designate one of the members of such as vice chairman. The only operational and functional authority provided for by the Act is given to the council which authority is "for the general purpose of assisting in the coordination of the state and local activities related to national and state defense."

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Regarding the exercise of authority by a council, which is similar to a board or commission, the following was stated in the case of State v. Kelly 21 A.L.R. 156, l.c. 170, 202 P. 524, 27 N.M. 412:

"It is argued, and correctly, that, where a duty is intrusted to a board composed of different individuals, that board can act officially only as such, in convened session, with the members, or a quorum thereof, present.* * *"

And in New England Box Co., v. C. & R. Constr. Co., 150 A.L.R. 152, l.c. 156, 49 N. E. (2d) 121, 313 Mass. 696, the court stated:

"* * *It is a general rule that a board of public officers should act jointly and that all should have an opportunity to participate in their action, Pettengell v. Alcoholic Beverages Control Commission, 295 Mass 473, 477, 4 N. E. (2d) 324, although the joint authority of a commission may be exercised by a majority. GL (Ter. Ed.) c4, Sec. 6, Fifth. Real Properties, Inc. v. Board of Appeal of Boston, 311 Mass. 430, 433-435, 42 N.E. (2d) 499. The members of a public board cannot act separately as individuals. Carbone, Inc., v. Kelly, 289 Mass. 602, 605, 194 N. E. 701. * * *"

The only operational and functional authority vested by the State Council of Defense Act is given to the council. This authority can therefore be exercised only by the council and it must be exercised by the council acting as a body in its official capacity. This conclusion is in harmony with an official opinion rendered by this department under date of January 15, 1942, to the Honorable Hugh Stephens, who then held the title of Administrator of the Missouri State Council of Defense.

Section 2 of House Bill No. 1, supra, appropriates a certain sum for the use of the State Council of Defense for a number of enumerated purposes. It is to the State Council of Defense that this money is appropriated, and since the

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functional authority of the Act is vested exclusively in the Council, this appropriation can be utilized only by the Council acting as a body in an official capacity. Furthermore, the authority vested in the Council by the Act is "for the general purpose of assisting in the coordination of the state and local activities related to national and state defense." It is only for this purpose and the exercise of this authority that money appropriated by Section 2 of House Bill No. 1, supra, can be expended. An appropriation act cannot include general legislation enlarging the scope of authority of the agency for which the appropriation is made. This rule and the reason therefor is stated by the court in the case of State ex rel. v. Canada, 113 S.W. (2d) 783, l.c.790, 342 Mo. 121, as follows:

"* * *This statute cannot be repealed or amended except by subsequent general legislation. Legislation of a general character cannot be included in an appropriation bill. To do so would violate section 28 of article 4 of the Constitution, which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no question but what the mere appropriation of money and the amendment of section 9622, a general statute granting certain authority to the board of curators, are two different and separate subjects. State ex rel. Davis v. Smith, 335 Mo. 1069, 75 S.W. 2d 828; State ex rel. Hueller v. Thompson, 316 Mo. 272, 289 S.W. 338. The valid and invalid portions of the statute are separable. If we disregard the invalid proviso, there is left a complete workable statute which appropriates the sum of \$10,000 for the purposes therein named. * * *"

Therefore, in answer to your first question, we are of the opinion that you, as alleged Chairman of the State Council of Defense, are without authority to expend funds appropriated by the Legislature for the use of the State Council of Defense.

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II.

The appropriation provided for in Section 2 of House Bill No. 1, supra, is for a period ending June 30, 1951, Senate Bill No. 66 of the 66th General Assembly has been recently introduced in the legislature. This bill provides for the repeal of the State Council of Defense Act and the establishment of a Division of Civil Defense. The other question presented in your request is whether or not the Division of Civil Defense, should it be created prior to June 30, 1951, could expend prior to June 30, 1951, the balance of the fund appropriated by Section 2 of House Bill No. 1.

Regarding this question, a thorough search has revealed no authority directly in point. There is a line of decisions however which establish the rule that acts of the legislature which repeal and reenact pre-existing statutes is but a continuation of the latter and the law dates from the passage of the first statute. In *Brown v. Marshall et al.*, 145 S. W. 810, l.c. 815, 241 Mo. 707, the court stated:

"(3) But, independent of that, there is another sound rule of statutory construction which governs this case, and that is a subsequent act of the Legislature repealing and re-enacting at the same time, a pre-existing statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. *State ex rel. v. Mason*, 153 Mo. 23, l.c. 58-59, 54 S. W. 524; *State ex rel. v. County Court*, 53 Mo. 128, l.c. 129-130; *Smith v. People*, 47 N.Y. 330. We therefore rule this contention against the appellants."

Also in *State v. Ward*, 40 S.W. (2d) 1074, l.c. 1078, 328 Mo. 658, it was held that:

"(10-11) III. The point that the repeal by the Fifty-fifth General Assembly in 1929 of Section 5596, R. S. 1919, and the enactment in lieu thereof of a new section to be known as section 5596 (Laws 1929, p. 217 (now Rev St. 1929 Sec. 8246), terminated the two year closed season voted by Harrison County in 1928, is without merit."

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From the foregoing, it might be argued that an act of the legislature repealing a former act establishing a certain agency, changing the name of the agency and including modifications which do not in effect change the nature, duties and operation of the former agency, can be considered a mere repeal and reenactment which is not in contemplation of law a repeal but rather an affirmance of the former statute whose provisions are continued without any intermission. It would then follow that the agency functioning under the new act could utilize the unexpended funds appropriated to the agency which operated under the old act, for in effect, they are the same agency.

However, even a cursory examination of the State Council of Defense Act and Senate Bill No. 66, the proposed Missouri Civil Defense Act of 1951, would reveal that the above theory would not be applicable here. The State Council of Defense was created and authorized "for the general purpose of assisting in the coordination of the state and local activities related to national and state defense." Senate Bill No. 66 provides for the establishment of a Division of Civil Defense. A council is provided for, but it serves only in an advisory capacity while the general control and supervision is to be exercised by the governor and director. We therefore see that the method of administration under the two acts is entirely different and unrelated. The authority and duties provided for by Senate Bill No. 66 are many and varied, giving the governor and director supervision and control over all civil defense activities in the state. It is also provided that upon the declaration of an emergency by the governor, he is given power which might be termed dictatorial in nature. We are of the opinion that Senate Bill No. 66 could in no way be considered a mere repeal and reenactment of the State Council of Defense Act which in legal effect would constitute an affirmance of the latter act and a mere continuation of its provisions.

Senate Bill No. 66 expressly repeals Sections 26.100, 26.110, and 26.120, R.S.Mo. 1949, the State Council of Defense Act. At the time Senate Bill No. 66 goes into effect, the State Council of Defense disappears, as also does the authority to expend what balance may remain from the fund appropriated by Section 2 of House Bill No. 1.

In view of the above, it is our opinion that the Division of Civil Defense, should it be established prior to June 30, 1951, cannot utilize the unexpended balance of the fund appropriated to the State Council of Defense.

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CONCLUSION

It is therefore the opinion of this department that the sum appropriated for the use of the State Council of Defense by Section 2 of House Bill No. 1 of the 66th General Assembly may be expended only by the State Council of Defense acting as a body in its official capacity.

It is further the opinion of this department that the proposed Division of Civil Defense, (Senate Bill No. 66, recently introduced in the 66th General Assembly), should it be established prior to June 30, 1951, cannot expend the balance of the fund appropriated for the use of the State Council of Defense for a period ending June 30, 1951.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

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