

OFFICERS: It is mandatory that a county surveyor in
COUNTY SURVEYOR: a county of not less than 20,000 nor more
than 50,000 must be ex officio highway
engineer.

December 9, 1941

Honorable David E. Blanton
Prosecuting Attorney
Scott County
Benton, Missouri



Dear Sir:

We are in receipt of your request for an opinion from this department under date of December 1, 1941, which reads as follows:

"The County Court of Scott County, Missouri, would appreciate an opinion from you on the following matters:

"Scott County is a county that has a population of 30,000 people, and as such under the provision of 8660 RS 1939, the County Surveyor is Ex officio Highway Engineer. The County Court is of the opinion that the County Surveyor is not performing the duties of the office of ex officio Highway Engineer. The Surveyor has appointed an assistant to perform the duties of his office, but said appointment was without the consent of the County Court. The County Court, however, has not been paying the salary of the assistant, and the County Court has refused to continue to pay the salary of the Surveyor as ex officio Highway Engineer. Please advise what power, or authority, if any, the County Court possesses to regulate the activity and conduct of the surveyor as ex officio Highway Engineer, and as to whether or not the County Court are within their rights in refusing to issue a warrant for the payment of his salary as

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ex officio County Highway Engineer, which was heretofore set out at \$125.00 per month.

"Please also advise as to whether or not the Surveyor can appoint an assistant in a county such as Scott County without the consent and approval of the County Court. Please also advise as to what steps, if any, might be taken and by whom for the removal of the said surveyor and also as ex officio County Highway Engineer.

"Scott County has for sometime maintained a road working crew, as have the other counties of the State, and has paid them after the Surveyor as ex officio Highway Engineer has OK'ed their statement for services rendered. The ex officio County Highway Engineer has, however, failed to OK the statements, and the Court is paying said statements, although they have not been approved by the ex officio Highway Engineer. The men who have performed the services are, in the main, day laborers and if they are not paid the highway work in the County of Scott will come to a standstill and the roads will soon be in a deplorable condition. Please advise what steps should be taken by the County Court with reference to the continued payment of the road workers.

"From the above, you can see the urgency of this matter, and your most prompt attention will be greatly appreciated by the County Court of Scott County, Missouri."

Section 8660, R. S., Missouri 1939, provides that the county court may appoint a county surveyor as county engineer and provides for the compensation of the county engineer and the appointment of assistants. It is to the effect that the county court of the several counties, in their discretion,

may appoint the county surveyor to the office of county highway engineer, and it further provided that the county surveyor may refuse to act as county highway engineer and in that event appoint an assistant with the approval of the county court who shall be paid a compensation as fixed by the county court.

This section also contained a provision which referred to counties having more than fifty thousand inhabitants or adjoining a certain city. This provision in Section 8660, supra, was held unconstitutional in the case of *State ex inf. v. Southern*, 177 S. W. 640. The provision for an appointment of a highway engineer first came into effect in 1909. It included the major part of Section 8660 of the Revised Statutes of Missouri 1939, but in 1939 the entire section was reenacted and the following provision added:

"* * * Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

The above provision is to the effect that in all counties in this state which contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants do not come within the general law as set out in Section 8660, supra. It specifically sets the salary of the ex officio county highway engineer. This provision is mandatory and does not call for any discretion on the part of the county court. It, in effect, abolished the office of highway engineer by legislative act instead of by suspension of the act by an election under Section 8668, R. S. Missouri 1939.

This provision is a special law and is an exception to the general law as set out in the balance of Section 8660, R. S. Missouri 1939.

The word "provided" was construed to be an exception in the case of *State v. Murphy*, 148 S. W. (2d) 527, par. 13, where the court said:

"Ordinarily the word 'provided' introduces a condition or exception and is often synonymous with 'if,' but sometimes, even in statutes, it has only the meaning of the conjunction 'and.' 50 C.J. pages 830, 831; *Doneghy v. Robinson*, Mo. Sup. 210 S. W. 655, loc. cit. 659; *State ex rel. v. Mooneyham*, 212 Mo. App. 573, 253 S. W. 1098."

It is also an exception for the reason that it minutely sets out a different payment and duty as is set out under the general law and is a later enactment than Section 8669, R. S. Missouri 1939, which provides specific duties and different amounts allowed to the ex officio county highway engineer.

In the case of *State v. Richman*, 148 S. W. (2d) 796, paragraphs 2,3, the court, in holding that the special statute governed over a general statute, said:

"In *State v. Harris*, 337 Mo. 1052, 1058, 87 S. W. 2d 1026, 1029, we said that if statutes are necessarily inconsistent that which deals with the common subject matter in a minute and particular way will prevail over one of a more general nature; and, citing authorities, we quoted the rule as stated in *State ex rel. County of Buchanan v. Fulks*, 296 Mo. 614, 626, 247 S. W. 129, 132, thus: "Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute."

Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication." "

When a special statute is later than a general statute relating to the same subject matter it will be regarded as exception to or qualification of the prior general one. State ex rel. Equality Savings and Bldg. Association v. Brown, 68 S. W. (2d) 55; State ex rel. Webster Groves Loan and Bldg. Association, 68 S. W. (2d) 60.

The above two cases even go further and hold that where a general statute was enacted subsequent to an earlier special statute relating to the same subject matter, the special statute will be construed as exception to the general statute, unless expressly or impliedly repealed.

The provision enacted in 1939, which was an exception to the general law as set out in that Section 8660, R. S. Missouri 1939, in a way took the duties of the county surveyor ex officio county highway engineer out of Article IX, Chapter 46, R. S. Missouri 1939, which referred to county highway engineer. It also placed the county highway ex officio county highway engineer and described his duties and salary as set out in Chapter 90, R. S. Missouri 1939, which sets out the duties of the county surveyor. The county surveyor, in a county such as Scott County, was entitled to his salary as surveyor and also to his salary as ex officio county highway engineer as determined by the county court under the provision above set out and contained in Section 8660, R. S. Missouri 1939. That he was not bound by the duties as prescribed under the chapter concerning county highway engineers was held in the case of Spurlock v. Wallace, 218 S. W. 890, where the court said:

"* * * Appellant claims that under the latter section he, as county surveyor, is ex officio county highway engineer, and that as such officer there are certain duties pertaining to the working, repairing, improvement, and main-

tenance of roads and highways, building of bridges and culverts, etc., which he is required to perform by virtue of his office and this statute, and that he must perform these duties without being ordered by the county court to do so; and that under and by virtue of certain statutes it is his duty to inspect and report certain work on the roads, bridges, culverts, etc. It is alleged that the county court is ordering and issuing warrants to road overseers for such work without any report being made by the appellant in relation thereto. It is also shown that, acting under sections 10571 and 10572, R. S. 1909, the people of Douglas county, at a duly called election voted against the proposition of having a county highway engineer. The appellant, therefore, claims that under these circumstances, by virtue of section 10572, he as county surveyor is also ex officio county highway engineer, and as such must perform the duties therein enumerated, and that the county court is without authority of law to issue and pay warrants to the road overseers until the appellant as such highway officer has inspected the work and reported thereon. It appears that the county court fixed the amount that the ex officio highway engineer was to receive, it being \$5 per day when actually engaged as such engineer by the court, and out of which he shall furnish his own conveyance and pay his own expenses while engaged as such engineer; and the order further provides that he shall work under the direction of the county court."

The court, further in the same case, said:

"If the contention made by appellant should be upheld, then we must necessarily hold

that to vote under section 10571, and to thereunder abolish the highway engineer act meant simply a change of the manner and amount of compensation to be paid to the party acting as highway engineer, as the appellant is contending that he is duty bound to perform exactly the same service that the highway engineer would have performed, even though the people have voted out this law. We cannot lend sanction to this narrow construction, as it would appear that the purpose of sections 10571 and 10572, R. S. 1909, was to permit the people of a county to abolish the office of highway engineer, yet to leave it possible for the surveyor to perform the duties that the highway engineer would have performed had the law not been voted out, provided he acted under the orders and direction of the county court. The general intent of section 10571 was to permit the people of a county to vote out a highway engineer, and to abolish the duties of such engineer, and that more was intended by said section than to merely give them the right to change the form and amount of compensation."

Under the above holding it is specifically stated that the duties of the highway engineer, when that position was abolished by an election, were not the same as if he was a highway engineer which had not been abolished by an election. Under the provision of Section 8660, supra, the legislature abolished the position of highway engineer insofar as to counties containing not less than twenty thousand inhabitants and not more than fifty thousand inhabitants in which bracket Scott County is, which was to the same effect as an election abolishing the office of highway engineer as set out in Section 8668, R. S. Missouri 1939.

Since the salary of the county surveyor is set, and since his salary is set under the provision of Section 8660, supra, as ex officio engineer, it is mandatory that the county court pay his salary as county surveyor and as ex officio engineer. It was so held in State v. Bulger, 233 S. W. 489, where

the court said:

"* * * So we repeat what we said as to the act of 1909, that the words 'as county surveyor and ex officio city highway engineer' as used through all these acts has reference to the office and to the duties of the highway engineer, and the pay there mentioned is to cover those duties, and not to cover the duties of county surveyor, as such. For services as county surveyor the salary is fixed at \$3,000 per annum. For 'county surveyor and ex officio county highway engineer' the salary is not less than \$3,000 nor more than \$5,000. More than the minimum of \$3,000 cannot be claimed, unless the county court has so ordered. The \$3,000 is fixed by law, and must be paid. We conclude that relator is entitled to two salaries of \$3,000 each, one as county surveyor, under section 11041, R. S. 1919, and one under section 10784, R. S. 1919. It therefore follows that our alternative writ should be made permanent, and it is so ordered."

Under Section 13208, R. S. Missouri 1939, the county surveyor may appoint deputies who shall take an oath to discharge their duties the same as the county surveyor. This section does not provide for any consent or approval of the county court. We find no law which provides that the county surveyor shall approve the payment of a road working crew employed by the county court for the reason that the county surveyor of Scott County is not subject to the rules and duties set out under Article IX, Chapter 46, which concerns county highway engineers. If the county surveyor of Scott County came within Section 8662, R. S. Missouri 1939 of the Highway Engineer Act, it would have been necessary for him to have approved the payment of the road crew. Where a county votes not to have a county highway engineer the duties of such office are abolished and the county courts may order warrants drawn to road overseers without having them approved by the county surveyor acting as ex officio engineer. It was so held in *Spurlock v. Wallace*, 218 S. W. 890. Under the provision of Section 8660, supra, the proviso abolished the county

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highway engineer in the same manner as if an election had been held.

The county surveyor is subject to removal for non-performance of his duties the same as any other elective county officer. Under Section 13208, R. S. Missouri 1939, which provides for the appointment of a deputy surveyor there is no provision for the payment of the deputy by the county court and it necessarily follows that his salary must be paid by the county surveyor. The removal of a county elective officer must be under the procedure as set out in Section 12828, R. S. Missouri 1939.

CONCLUSION

In view of the above authorities it is the opinion of this department that the county surveyor has the authority to appoint a deputy but that the county court is not authorized to pay the deputy.

It is further the opinion of this department that it is mandatory for the county court to pay the county surveyor his salary as county surveyor and also his salary as ex officio county highway engineer as set out in the provision in Section 8660, R. S. Missouri 1939.

It is further the opinion of this department that the county surveyor of Scott County can appoint a deputy without the consent and approval of the county court.

It is further the opinion of this department that in order to oust the county surveyor for not performing his duties the procedure to be followed is set out in Section 12828, R. S. Missouri 1939.

It is further the opinion of this department that the County Court of Scott County can pay a road working crew without the approval of the county surveyor as ex officio highway engineer.

Respectfully submitted

APPROVED:

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