

HIGHWAY ENGINEER: In counties having a population of more than 20,000
COUNTIES: and less than 50,000 inhabitants where the county
surveyor is ex officio highway engineer, under Sec-
tion 8660, R.S.Mo. 1939, the county court may not
appoint a county highway engineer prior to January 1,
1949, or until after expiration of term of office of
such county surveyor or a vacancy exists in the
office of county surveyor.

February 9, 1948



Honorable Ralph H. Duggins
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

This will acknowledge receipt of your request for an
opinion which reads:

"This office has been requested to obtain
an opinion by the honorable County Court
of Saline, Saline County Missouri on the
following matter: Does the County Court
have any authority or control over the
county engineer in third class counties
to direct and authorize work on county
roads, bridges and culverts in accordance
with Article 9, Section 8655 to 8659
inclusive?"

"The County Court has been informed that
in other counties of the similar class the
County Court has appointed a County High-
way Engineer and that said engineer is
holding office in accordance with above
named sections. This office would appre-
ciate an opinion as to whether the County
Court has authority to appoint a County
Highway Engineer effective January 1, 1948."

We have purposely withheld rendering this opinion until
the Supreme Court had an opportunity to pass upon a quo war-
ranto proceeding in the case of J. E. Taylor, Attorney General
vs. Fred H. Kiburg, Jr., filed to determine respondent's
title to office of county highway engineer in St. Louis County,
Missouri.

In regard to the respective duties of the county court
and county highway engineer, appointed by the county court,
and how far the county court may go toward directing said
county highway engineer to do said work on county roads,

bridges and culverts, we are enclosing a copy of an opinion recently rendered by this department to Honorable John E. Brooks, Associate Judge of the Franklin County Court, Union, Missouri, under date of June 10, 1947, which we believe will fully answer that part of your request.

You further inquire if the county court of a third class county may, as of January 1, 1948, appoint a county highway engineer. Section 8655, R. S. Mo. 1939, provides that the county court in any county of this state may appoint a county highway engineer, and further provides the term of office and that said court shall fix his compensation, and reads:

"There is hereby created in the several counties of the state of Missouri the office of county highway engineer, and the county courts of each county in this state are hereby authorized and empowered to appoint, and may appoint a highway engineer within and for their respective counties at any regular meeting for such length of time as may be deemed advisable in the judgment of the court, at a compensation to be fixed by the court."

Under Section 8660, R. S. Mo. 1939, among other things it provides that the county surveyor, after January 1, 1941, in counties the size of your county, shall also be ex officio county highway engineer, and reads in part:

"The county court of the several counties in this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in section 8657, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor: Provided, that in counties in which the provisions of this article with reference to the appointment of a county highway engineer have not been suspended as hereinafter provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In

the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court: * * * * *

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 63rd General Assembly repealed Sections 8655, 8657, 8659, 8660, 8668, 8669 and 8670, R. S. Mo. 1939, and enacted in lieu thereof three new sections known as Sections 8655, 8659 and 8660, pages 1493 and 1494, Laws of Missouri, 1945. Section 8655, page 1493, Laws of Missouri, 1945, reads:

"The county courts of each county in this state in classes two, three and four are hereby authorized and empowered to appoint and reappoint a highway engineer within and for their respective counties at any regular meeting, for such length of time as may be deemed advisable in the judgment of the court at a compensation to be fixed by the court. The provisions of this article shall apply only to counties of classes two, three and four."

Section 8660, page 1494, Laws of Missouri, 1945, reads:

"The county court may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, and such fees as are allowed by law for his services as county surveyor: Provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county

highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

We are assuming the following to be true, that your county has a population of more than 20,000 and less than 50,000 inhabitants, and therefore, under the foregoing proviso in Section 8660, R. S. Mo. 1939, the county surveyor of your county is now ex officio county highway engineer. If this be true, then we construe the decision in State of Missouri on information of J. E. Taylor, Attorney General, Relator vs. Fred H. Kiburz, Jr., Respondent, recently rendered by the Supreme Court, to hold that H.C.S. H.B. No. 792, pages 1493-1494, Laws of Missouri, 1945, as passed by the 63rd General Assembly, does not repeal Section 8660, R. S. Mo. 1939, so long as no vacancy exists in the office of county surveyor prior to January 1, 1949. While the foregoing decision deals with another proviso in Section 8660, R. S. Mo. 1939, said provision is very similar to the one applicable to your county, and we think what the court held applies to both provisions in Section 8660, R. S. Mo. 1939. In this instance your county surveyor is not deceased, neither has he resigned. Therefore, under the foregoing decision, it is quite apparent that Section 3 of the Schedule in the Constitution of Missouri, 1945, prevents the Legislature from disturbing this office in the present incumbent's term, to which he was elected. In so holding, the court said:

"The relator further contends that even though the proviso be deemed inconsistent with Sec. 8, Art. VI, the latter section 'has been suspended by the provisions of Sec. 3 of the Schedule, at least during the terms of those persons holding office at the time of the adoption of such Constitution.' From this premise it is argued that the intent of Sec. 3 of the Schedule is 'to preserve intact for the fixed and definite period of time for which they had been appointed or elected, the offices of the persons holding them at the time of the adoption of the Constitution.' It is said that the legislature so construed these provisions when it enacted Sec. 13190a, Mo. R.S.A., Laws 1945, p. 1759, which will be hereinafter noticed.

"We are of the opinion, and so hold, that Sec. 3 of the Schedule would not operate to preserve the second proviso after Jablonsky's death for the remainder of the term for which he had been elected, and thus immunize the office from the effects of any repeal of the proviso during the whole of that period. Sec. 3 of the Schedule says, 'The terms of all persons holding public office to which they have been elected or appointed at the time this Constitution shall take effect shall not be vacated or otherwise affected thereby.' This provision was intended to protect the then incumbents, and conferred upon them the right to hold for the remainder of their respective terms; but it has no reference to their successors because it does not purport to speak with reference to the office itself. It does not mean that the office may not be affected by the provisions of the Constitution, (or a subsequently enacted statute) during the term for which the incumbent was elected, in the event of the latter's death or resignation. To hold otherwise would mean that the successor to a supreme or an appellate judge (one in office at the time the Constitution became effective) would not be bound by the constitutional requirement for retirement upon attaining the age of 75, (Sec. 25, Art. V) until the lapse of the term for which his predecessor was elected or appointed. Or, take the case of the successor to a circuit judge in the same situation. It will be assumed that because of Sec. 3 of the Schedule, the provision for compulsory retirement for disability (Sec. 27, Art. V) would not affect the incumbent judge, during his tenure, but who would contend that his successor, while serving the unexpired portion of that term, would not be subject to such provisions?"

Furthermore, in view of what has been said, we do not deem it necessary to determine at this time if Section 8655, R. S. Mo. 1939, was repealed as of July 1, 1946, or will be repealed as of January 1, 1949, as provided in Section 8659, pages 1493-1494, Laws of Missouri, 1945, which is a part of H.C.S. H.B.

No. 792, supra. There is some question as to whether the court, in the foregoing decision, passed upon that particular point; however, we can see no reason to be disturbed over that because under any circumstances at the expiration of the present term of office of your county surveyor, the county court in your county, under Section 8655, R. S. Mo. 1939, or under the same Section, page 1493, Laws of Missouri, 1945, may appoint a county highway engineer.

CONCLUSION

Therefore, it is the opinion of this department that the county court of Saline County can not appoint a county highway engineer until after the expiration of the present term of office of the county surveyor in said county, who is now ex officio county highway engineer, as provided in Section 8660, R. S. Mo. 1939. The enclosed copy of opinion rendered by this department prescribes the respective authority and duties of the county court and county highway engineer relative to maintenance, location and construction of highways and culverts.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
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ARH:VLM

Enc.