

OFFICIAL OPINION NO. 14

March 14, 1945.

Hon. Otto K. Jensen, State Examiner,
Department of Inspection and
Supervision of Public Offices,
State House,
Indianapolis 4, Indiana.

Dear Sir:

Your letter of January 17, 1945, received, requesting an opinion on the following questions:

"1. Is the city engineer of a city having a population of more than 100,000 entitled to the salary provided by Section 4 of Chapter 152, Acts of 1923, as amended by Chapter 25, Acts of 1933, in addition to the salary provided for the city engineer by Section 11 of Chapter 233, Acts of 1933?"

"2. Is an appropriation by the common council by ordinance of the track elevation funds of a city required prior to the expenditure or disbursement thereof?"

"3. If the salary of an employee or assistant of a city other than those whose salaries are fixed by the common council and which salary is to be paid from two or more funds or appropriations and the sum of the several appropriations therefor is in excess of the salary of such employee or assistant as fixed by the mayor with the approval of the common council, is such employee or assistant entitled to be paid the total amount of the several appropriations so made, or is he limited to payments which do not exceed in total the salary so fixed by the mayor?"

Chapter 152 of the Acts of 1923, as amended by Chapter 25 of the Acts of 1933, is Section 48-3401 *et seq.* Burns' 1933, and concerns track elevation proceedings. As originally enacted in 1923 it applied to cities of more than one hundred thousand (100,000) population. Under the 1933 amendment it was made to apply to cities of more than three hundred thousand (300,000) population, being so designated both in

the title and body of such Act as amended. The 1933 amendment contained an emergency clause, was approved by the Governor February 8, 1933, and was effective on said date.

Chapter 233 of the Acts of 1933, same being Section 48-1201 *et seq.* Burns' 1933, commonly known as the cities and towns Act of 1933, contained an emergency clause, was approved by the Governor on March 9, 1933, and was effective on that date.

Each of the questions presented are somewhat related to each other and require a construction of the foregoing statutes.

The pertinent provisions of Chapter 152 of the Acts of 1923, necessary for consideration here are as follows: Section 1 of Chapter 152, Acts of 1923 as amended by Section 4, Chapter 25, Acts of 1933, being Section 48-3401 Burns' 1933, provides in part as follows:

"Upon petition therefor, or upon its own initiative, the board of public works of any city of more than three hundred thousand (300,000) population, according to the last preceding United States census, may adopt a resolution for the alteration of any grade crossing or crossings of any steam railroad track or tracks and any highway or highways in said city and the approaches thereto, or for the elevation or depression of the steam railroad track or tracks crossing any highway or highways in said city. * * * In the preparation or consideration of said resolution said board may cause plans and specifications to be prepared by the city civil engineer prescribing the manner, character and limits of such improvement in the alteration of existing grade crossings, or the elevation or depression of tracks thereat, together with an estimate of the total cost thereof; * * *"

Section 2 of Chapter 152, Acts of 1923, same being Section 48-3402 Burns' 1933, provides in part as follows:

"If there be more than one (1) railroad company with tracks affected, then, said board of public works shall, at such hearing determine the relative amount of such improvement equitably to be borne by each of said railroad companies. The expense to be borne

by all parties in interest shall include any expense which may be incurred by raising or lowering the grade of any street, alley or other highway, and the construction and reconstruction of the pavement of the entire width of the street, including sidewalks and the alteration and construction of necessary drains required by such separation of grades; * * * and shall also include that portion of the annual sums hereinafter provided for to be paid for the services of the city civil engineer, his assistants, inspectors and clerks, that relates to the time consumed in the construction of such improvement, as shall be determined by the board. The steam railroad or railroads whose tracks are affected shall pay fifty (50) per cent of such total cost. * * *” (Our emphasis.)

Section 4 of Chapter 152, Acts of 1923, as amended by Section 1, Chapter 25, Acts of 1933, same being Section 48-3404, Burns' 1933, reads in part as follows:

“* * * The board may employ such engineers, draftsmen, inspectors and clerks as may be necessary to prepare surveys and plans and properly supervise any such work, at such salaries as may from time to time be fixed by it, which salaries shall not exceed those paid by said city for similar services. *It shall likewise require the services of the city civil engineer, who shall be paid for his services in connection with said work, in addition to his regular salary, the sum of five thousand dollars (\$5,000.00) per annum for his services.* * * *” (Our emphasis.)

Section 6 of Chapter 152, Acts 1923, same being Section 48-3406 Burns' 1933, provides in part as follows:

“* * * Upon completion of the work or from time to time during its progress upon petition of the city or the railroad charged with the work, or part thereof, said board shall adjust equitable settlements between the parties interested therein, in such manner that the total cost of such alteration shall be apportioned between the parties as theretofore decided on by said board; and such adjustment shall be binding

on said parties, unless any aggrieved party shall within fifteen (15) days after the entry of the order of the board thereon, file his complaint in said superior court to review such adjustment, and the decree of such court therein shall be final. The railroad corporation or corporations including as well the street railway company, shall upon such adjustment or decree pay their portion of such cost as directed thereby, or in default thereof the same may be placed on the tax duplicate and collected as are special assessments. Upon each such settlement, *the city controller shall draw his warrant or warrants upon the city treasurer in payment of its portion of such costs, which may be drawn upon the fund of the city provided for such purpose without a special appropriation being made therefor by the city council; said fund to be raised in the manner hereinafter provided. Upon each such settlement, the county auditor shall draw his warrant or warrants upon the county treasurer in payment of the county's portion of such cost, which may be paid out of the general funds of said county without a special appropriation therefor by the county council.*" (Our emphasis.)

Section 7 of Chapter 152, Acts of 1923, same being Section 48-3407, Burns' 1933, after generally providing that in the event railway companies were financially unable to assume the burden of such track elevation that the same could be carried on by an elevation of a portion of such tracks each year, further provides:

"* * * and during the progress of said work said board, by its engineer, shall inspect said work and shall from time to time, make and allow estimates for the cost of the work completed, not exceeding however, ninety (90) per cent of the total amount of each such estimate, and upon such estimates being approved by the board of public works and the payment thereof found due and authorized to be made by said board, *the city controller shall draw his warrant or warrants upon the city treasurer in payment thereof, as provided in section six (48-3406) of this act, and the county auditor shall draw his warrant or warrants in*

*a like manner upon the county treasurer in payment of the county's portion thereof as provided in section six (48-3406) of this act, which payments herein provided may be made up to the full proportion of the total cost of said work to be paid by said city and said county, as fixed and provided in section two (48-3402) of this act. * * ** (Our emphasis.)

Section 9 of Chapter 152, Acts 1923, same being Section 48-3409 Burns' 1933, is as follows:

"For the purpose of providing funds to meet and defray said city's proportion of the expense of such separation of grades, the city council of said city shall annually, upon the estimate of the city controller, levy a tax of not more than six cents (6c) on each one hundred dollars (\$100) of taxable property in said city, in addition to the annual levies now authorized by law; and *the proceeds of such levy shall be kept in a separate and continuing fund and shall be used only for the purposes herein provided*, and no warrant or warrants shall be drawn against said fund for any other purpose than the payment of the costs of such alterations in said grade crossings and the depression or elevation of said steam railroad tracks as herein provided and the payment of the bonds issued by said city for said purpose as hereinafter provided. For the purpose of meeting and defraying the county's portion of the expense of such separation of grades and to pay the bonds issued by said county for said purpose as herein provided the county council shall annually levy a tax of not more than three cents (3c) on each one hundred dollars (\$100) of taxable property in said county, in addition to the annual levies now authorized by law. Said city and said county are hereby authorized respectively to issue and sell bonds and to levy taxes to pay the same, as herein provided for the purpose of paying their respective parts of the cost of such alteration in grade crossings. *Any money in the 'track elevation fund' of said city which shall not be needed by said city to discharge any obligation of said city against said fund shall be transferred to and become a part of the fund herein author-*

ized and may be used by said city in payment of the city's obligations incurred under this act." (Our emphasis.)

The pertinent provisions of the Cities and Towns Act, being Chapter 233 of the Acts of 1933 as applicable to the questions presented are as follows:

Section 10, Chapter 233, Acts 1933 as amended by Section 2, Chapter 307, Acts of 1935, same being Section 48-1222 Burns' 1943 Supplement, provides in part as follows:

"* * * The salaries of each and all of such appointive officers, employees, deputies, assistants and departmental and institutional heads, other than those fixed by the common council under the provisions of this act, shall be fixed by the mayor subject to the approval of the common council, which may reduce but in no event shall raise the salary so fixed. * * * All salaries fixed by the mayor with the approval of the common council in accordance with the provisions of this act, shall be fixed on or before the first Monday in September of each year for the next calendar year immediately ensuing and when so fixed shall not be increased during such ensuing calendar year except as provided in this act."

Section 11, Chapter 233, Acts 1933, same being Section 48-1223 Burns' 1933, which fixes generally the salaries of the municipal officers, insofar as the city engineer is concerned, provides as follows:

"* * * city engineer, four thousand five hundred dollars (\$4,500); Provided, The salary established within the maximum herein named for the city engineer shall be in full for all services of whatsoever kind or nature, including his services as member of the board of sanitary commissioners and he shall receive no other fees, per diem or emoluments whatsoever;
* * *"

Another pertinent statute to be considered in connection with the construction of Chapter 233, Acts 1933, *supra*, is Section 56, Chapter 129 Acts 1905, same being Section 48-1411

Burns' 1933, regarding the necessity of appropriations by city ordinance for payment of salaries, and reads as follows:

"No order or warrant for any purpose shall be drawn against the funds of any city, in the hands of the treasurer or other officer, unless an appropriation has been made by ordinance for such purpose and such appropriation is not exhausted, or unless such order or warrant shall be for a salary fixed by statute or ordinance, or in payment of a judgment which such city is compelled to pay, or for interest due on city bonds."

1. In answer to your first question I wish to advise the above statutes are subject to the following well known rules of statutory construction:

Statutes must be construed as a whole in order to determine the legislative intent.

Snyder v. State, *ex rel.* Leap (1933), 206 Ind. 474, 478;
 State v. Ritter's Estate (1943), 221 Ind. 456, 48 N.E. (2d) 993, 998.

Courts will look to the general purpose and scope of a statute to determine the legislative intent.

City of Indianapolis v. Evans (1939), 216 Ind. 555, 567;
 State, *ex rel.* Bailey v. Webb (1939), 215 Ind. 609, 612.

From the language used in Section 48-1223 Burns' 1933, *supra*, providing the salary of the city engineer shall be forty-five hundred dollars (\$4,500.00) per year, in full and for all services of whatsoever kind or nature, etc., and from an examination of Section 48-3404 Burns' 1933, *supra*, providing that said city engineer shall receive the sum of five thousand dollars (\$5,000.00) per annum for his services, in addition to his regular salary, it would appear said statutes are in irreconcilable conflict with each other. It is to be noted Section 48-3404 Burns' 1933, *supra*, was originally passed in 1923 and said section of the statute amended as to

other matters by the Legislature in 1933. However, this statute was so amended to apply to cities of three hundred thousand (300,000) or more from an original designation of application to cities of one hundred thousand (100,000) or more, and became effective February 18, 1933. Section 48-1223 Burns' 1933, *supra*, was enacted in 1933 and became effective March 9, 1933. Under the general rule of statutory construction, that in cases of irreconcilable conflict between separate Acts passed at the same session of the General Assembly, the last Act passed and becoming effective would control. However, I do not believe this result is obtained for the reasons hereinafter stated.

An examination of Chapter 152 of the Acts of 1923, same being Section 48-3401 *et seq.*, Burns' 1933, *supra*, reveals that said statute when construed in its entirety is a special statute applying to track elevation in cities of more than three hundred thousand (300,000) population.

It provides among other things that the city engineer may be required by the board of public works of said city to perform the services prescribed by said Act in prescribing preliminary plans, specifications, and estimates of such track elevation as well as inspecting and assisting in the carrying on of such work throughout its construction. It is pertinent to note the salary fixed *by the Legislature* of five thousand dollars (\$5,000.00) additional salary for such services of such city engineer exceeds the regular salary of forty-five hundred dollars (\$4,500.00) per year authorized by Section 11, Chapter 233 of the Acts of 1933, being Section 48-1223 Burns' 1933, *supra*. It is to be noted that while the regular salary of said city engineer under said Chapter 233 of the Acts of 1933, *supra*, must be fixed by ordinance of the city council under appropriations made pursuant to the provisions of Section 48-1411 Burns' 1933, *supra*, the additional salary of five thousand dollars (\$5,000.00) authorized by said track elevation statute, being Section 48-3404 Burns' 1933, is fixed by statute, and not by the mayor subject to the approval of the city council, *and may be paid from the general funds of the county and from the special track elevation fund of the city, on demand of the board of public works, without any appropriation therefor.* I am therefore of the opinion Section 48-3404 Burns' 1933, *supra*, being the track elevation statute authorizing the payment of such additional sum of five thou-

sand dollars (\$5,000.00) per year to the city engineer when called upon to perform the services specified in said Act, is a special statute which would not be repealed or modified by the enactment of Section 11, Chapter 233 of the Acts of 1933, same being Section 48-1223 Burns' 1933, *supra*. In such a case the construction of such statutes are subject to the rule announced in the case of Million *et al.* v. Metropolitan, etc., Co. (1932), 95 Ind. App. 628, where the court, in holding that a special statute dealing with improvement of State highways, which statute determined the notice to be given sureties on the general contractor's bond, was a special statute and was not repealed by a later general statute covering the notice to be given by sub-contractors and material men to sureties on bonds, said on page 637 of the opinion:

“* * * The above act was a special act, creating the highway commission and defining its powers, etc., and it is a fundamental rule of construction that ‘special acts’ are not repealed or modified by ‘general acts,’ by implication. It is held that a general act ‘repealing all laws inconsistent therewith,’ refers to general laws and does not change or repeal ‘special laws.’ (Citing Cases) * * *”

Also see: Knox County Council v. State, *ex rel.* McCormick (1940), 217 Ind. 493, 514;
Straus Brothers Co. v. Fisher (1928), 200 Ind. 307, 316.

In the case of State, *ex rel.* v. International Harvester Company (1939), 216 Ind. 463, the court was called upon to determine the legality of two statutes, apparently inconsistent, passed by the same session of the Legislature, regarding licensing of foreign corporations, and in holding said Acts would not be construed to be in irreconcilable conflict with each other, said on page 467 of the opinion:

“Repeals by implication are disfavored. Where two acts are seemingly repugnant, they should be construed, if possible, so that the later will not operate as a repeal or modification of the former. If, by the application of every reasonable rule of construction, substantial harmony is found possible, then there is

no irreconcilable conflict. The presumption is especially strong against an implied repeal of an act by another act of a later date at the same session of the Legislature. There is no inference that one act was intended to destroy another if they are on the same subject-matter and enacted at the same meeting of the Legislature, but, on the contrary, they should be construed, if possible, to give full effect to each. The purpose of all rules of statutory construction is to ascertain the legislative intent. *Where two statutes, apparently inconsistent, are passed at the same session of the Legislature, the one dealing with the common subject in a more minute way will prevail over the one of a more general character.* Hennessey v. Breed, Elliott & Harrison, Inc. (1931), 92 Ind. App. 165, 177, 176 N.E. 251; Cleveland, etc. R. Co., v. Blind (1914), 182 Ind. 398, 105 N.E. 483. * * *” (Our emphasis.)

I am further of the opinion that within the purview of the law as stated in the last above quoted case, Section 48-3404 Burns' 1933, *supra*, authorizing such additional payment of said sum of five thousand dollars (\$5,000.00) a year for such services performed by said city engineer, deals with such subject in a more minute way and would prevail over the provisions of Section 48-1223 Burns' 1933, being Section 11, Chapter 233, Acts of 1933, *supra*, which latter statute is a more general statute regarding payment of salary of such city engineer.

2. Your second question, in my opinion, has been answered by the answer given to your question number one as Section 48-3406 Burns' 1933, being Section 6, Chapter 152, Acts 1923, hereinbefore set out provides that payment for such services and expenses may be made by the city controller drawing his warrant upon the city treasurer without any special appropriation therefor by the city council.

Attention is called to the fact that Section 11, Chapter 233, Acts 1933, same being Section 48-1223 Burns' 1933, *supra*, was amended by House Bill Number 125 of the Acts of the General Assembly for 1945, which contained an emergency, was signed by the Governor on March 6, 1945, and reads as follows:

“In cities having a population of over two hundred fifty thousand as shown by the last preceding United States census, the annual salaries for the officers herein named shall be fixed by the common council at the following amounts: Mayor, twelve thousand dollars; City Clerk, four thousand dollars; *ex officio* City Treasurer, sixteen hundred dollars; County Auditor for services to civil city, six hundred dollars; members of the Common Council, twelve hundred dollars; and for the president thereof and the chairman of the finance committee thereof, six hundred dollars in addition thereto. Such compensation for services to the city of the *ex officio* City Treasurer and County Auditor shall be paid in accordance with the provisions of the Act concerning salaries of county officials, the same being Chapter 234 of the Acts of 1941, as amended by Chapter 212 of the Acts of 1943. The salaries of all other officers, employees, deputies, assistants and department and institutional heads of such cities not named in this section but otherwise provided for by law shall be fixed in the manner provided in section 10 of this act.”

It is to be noted the above amendment of Section 11 of said Act deletes from said Act the former provision that the city engineer's salary shall be forty-five hundred dollars (\$4,500.00) and “shall be in full for all services of whatsoever kind or nature, including his services as member of the board of sanitary commissioners and he shall receive no other fees, per diem or emoluments whatsoever,” and makes said city engineer's salary such as is set by the mayor and approved by the common council of the city. However, this would not affect the answers previously given to your questions numbered one (1) and two (2) for the reasons such salary of five thousand dollars (\$5,000.00) for the services of the city engineer in performing work under such track elevation statutes, *supra*, to be paid said city engineer *in addition* to his regular salary which is now under the new 1945 Act set by the mayor subject to the approval of the common council of such city.

3. In answer to your third question it is my opinion the salary of employees or assistants of a city whose salaries are to be set by the mayor subject to the approval of the

common council, and whose salaries are paid from two (2) or more funds or appropriations, the total sum of such appropriation being in excess of the salaries of such employees or assistants as fixed by the mayor with the approval of the common council, cannot exceed the salary fixed by the mayor under the clear provisions of Section 48-1222 Burns' 1943 Supplement, *supra*, which in part provides:

“* * * The salaries of each and all of such appointive officers, employees, deputies, assistants and departmental and institutional heads, other than those fixed by the common council under the provisions of this act, shall be fixed by the mayor subject to the approval of the common council, *which may reduce but in no event shall raise the salary so fixed.* * * *”
(Our emphasis.)

Such employees' salaries therefore would remain at the amount fixed by the mayor subject to the approval of the common council, regardless of any excessive appropriation therefor by the common council, in the absence of a special statute controlling in any particular case. An appropriation is a legal setting apart or assigning of public funds for a named use, and it does imply a fixing of salaries.

However, it is pointed out this answer would not apply to the additional five thousand dollars (\$5,000.00) per year salary authorized for such city engineer under the provisions of Section 48-3404 Burns' 1933, *supra*, for the reasons pointed out in answers to your questions numbered one (1) and two (2).

OFFICIAL OPINION NO. 15

March 14, 1945

Hon. A. V. Burch,
Auditor of State,
State House,
Indianapolis, Indiana.

Dear Sir:

I have the inquiry of Hon. Richard T. James, Auditor of State, which reads as follows: