

year prior to January 1st, 1937, shall be considered as a part of this permit.

In consideration of the permit so granted and the privileges thereby conferred, the permittee in and by this instrument agrees to pay to the State of Ohio a royalty of five cents per ton of sand and gravel removed by it under the terms of the lease, with the further provision that sand and gravel removed from the bed of Lake Erie or from the bed of streams flowing into said lake prior to January 1, 1937, shall be paid for at the rate of three cents per ton.

The permit here in question is one granted by you as Superintendent of Public Works under the authority of Substitute Senate Bill No. 236, enacted by the 91st General Assembly under date of May 21, 1935, 116 O. L., 244. And upon examination of the terms of this written permit, I find that the provisions thereof and the conditions and restrictions therein contained are such as are consistent with the provisions of this act and with other statutes and common law principles touching the rights of the State in the waters and subaqueous lands of Lake Erie and of the open bays and harbors thereof. The permit has been properly executed by you as Superintendent of Public Works and as Director of said department, acting on behalf of the State of Ohio, and by the permittee by the hands of Joseph H. Scanes and Grace Scanes.

I am, therefore, approving this permit as to legality and form, as is evidenced by my approval endorsed upon this permit and upon the duplicate and triplicate copies thereof, all of which are herewith enclosed.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

942.

INCUMBENT COUNTY COMMISSIONER AT TIME OF PASSAGE NOT AFFECTED BY AMENDED SECTION 3001, GENERAL CODE, DURING EXISTING TERM OF OFFICE.

SYLLABUS:

By virtue of the provisions of Section 20, Article II of the Constitution of Ohio, the compensation of the incumbents of the office of county commissioner, prior to the effective date of amended Section 3001,

General Code, is not subject to the changes effected by that section during their then existing terms of office.

COLUMBUS, OHIO, July 29, 1937.

HON. ROY L. HENRY, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR: I have your letter of recent date in which you request my opinion as to the right of the appointee to the vacancy in the office of County Commissioner occasioned by the death of Mr. Harry Banton, to qualify for compensation under the provisions of amended Section 3001, General Code.

House Bill No. 147 was passed by the General Assembly on April 9, 1937, approved by the Governor on May 3, 1937, and when it becomes effective on August 5, 1937, will have the effect of amending Section 3001, General Code, to read as follows:

“The annual compensation of each county commissioner shall be determined as follows:

Each county commissioner shall receive sixty dollars for each full one thousand of the first fifteen thousand of the population of the county, as shown by the last federal census next preceding his election;

fifty dollars per thousand for each full one thousand of the second fifteen thousand of such population of the county;

forty dollars per thousand for each full one thousand of the third fifteen thousand of such population of the county;

twenty-five dollars per thousand for each full one thousand of the fourth fifteen thousand of such population of the county;

fifteen dollars per thousand for each full one thousand of the fifth fifteen thousand of such population of the county;

ten dollars per thousand for each full one thousand of the sixth fifteen thousand of such population of the county;

and five dollars per thousand for each full one thousand of such population of the county, in excess of ninety thousand.

Such compensation shall be paid in equal monthly installments from the county treasury upon the warrant of the county auditor, provided that in no case shall the annual compensation paid to a county commissioner exceed five thousand dollars; except that in counties having a population of over one million, the salaries of county commissioners in such counties shall at no time be less than that paid to the auditor in said counties. The minimum salary shall not be less than twelve hundred dollars, but in no case shall the compensation be less than that

received by the commissioners in any county at the time this bill becomes effective.”

The detailed method of computing the annual compensation of County Commissioners as provided for in the foregoing amended statute is a departure from the present method of determining commissioners' salaries upon the aggregate of the tax duplicates for real estate and personal property in the several counties. This new method will result in a revision upward or downward of the compensation of county commissioners, consequently the question you present is of state-wide importance, and the conclusion reached in this opinion will necessarily apply to all present incumbents of the office of county commissioner whether they have been duly elected and qualified or appointed as in the case you present.

The question whether or not the incumbent county commissioners at this date are subject to the method of computing compensation as set up in Section 3001, General Code, *supra*, resolves itself simply into a matter of determining whether the salary of any officer can be changed during his existing term.

Article II, Section 20 of the Constitution of Ohio reads as follows:

“The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.”

The above constitutional provision was under review by the Supreme Court of Ohio in the case of *State, ex rel. vs. Raine*, 49 O.S. 580. In that case a taxpayer sought to test the constitutionality of a statute that proposed to allow county commissioners one thousand dollars (\$1,000.00) per annum for expenses in counties having a population of two hundred fifty thousand (250,000) or upward. The constitutionality of this statute was attacked on the ground that it increased the salaries of county commissioners during the term for which they were elected and therefore violated Article II, Section 20 of the Constitution of Ohio, *supra*.

In holding that the term “expenses” as used in the statute under consideration by the court in *State, ex rel. vs. Raine, supra*, was merely another form of compensation, the Supreme Court said in the syllabus:

“A statute, whatever terms it may employ, the only effect of which is to increase the salary attached to a public office,

contravenes Section 20, of Article II, of the Constitution of this state, in so far as it may affect the salary of an incumbent of the office during the term he was serving when the statute was enacted."

The foregoing case has been cited with approval in the case of *Gobrecht vs. Cincinnati*, 51 O.S. 68 at 73, and the late case of *State, ex rel. vs. Tracy, Auditor*, 128 O.S. 242, at 253, and unquestionably stands as the law today, that the compensation of the incumbents of the office of county commissioner cannot be changed during the term of office for which they were elected. In further support of the principle that the General Assembly cannot effect a change in the salary of any officer during his existing term, I direct your attention to the cases of *State, ex rel. Metcalfe vs. Donahcy*, 101 O.S. 490; *Zangerle et al., vs. State, ex rel. Stanton, et al.*, 105 O.S. 650; *State, ex rel. Holmes vs. Thatcher*, 116 O.S. 113; *State, ex rel. Hickenlooper vs. Beaman*, 16 O. App., 70 and *Bordenkircher vs. Lingrel, Auditor*, 29 N.E. (n.s.) 559.

In view of the law on this subject as hereinbefore set forth, it is my opinion that amended Section 3001, General Code, has no application whatever to the present incumbents of the office of county commissioner. In specific answer to your inquiry, I wish to reiterate that the effective date of amended Section 3001, General Code, is August 5, 1937, and the appointee to the vacancy of the office of county commissioner under consideration, necessarily assumed his duties and was fully invested with the office before the effective date of this Act. Therefore I am constrained to advise that the appointee in question cannot qualify for compensation under the provisions of the new Act.

Respectfully,

HERBERT S. DUFFY,

Attorney General.