

Item # 16

**Carson City
Agenda Report**

Date Submitted: October 27, 2009

Agenda Date Requested: November 5, 2009

Time Requested: 15 Minutes

To: Mayor and Supervisors

From: City Manager

Subject Title: Request for adoption of a resolution calling for a special election for the filling of the future vacation of the position of Justice of the Peace, Department 1 based on Judge Willis' resignation letter.

Staff Summary:

Judge Willis has submitted a letter of resignation giving notice that the position will be vacant January 4, 2011, with the idea that the City has time to add this position to the 2010 election process, thereby avoiding the cost and effort of a separate Special Election.

Upon the occurrence of a vacancy for an unexpired term, the Board of Supervisors has the choice of appointing a replacement pursuant to NRS 4.150(a) or have the vacancy filled through a special election pursuant to NRS 4.150(b).

Type of Action Requested: (check one)

(☐) Resolution

(☐) Ordinance

(☒) Formal Action/Motion

(☐) Other (Specify)

Does This Action Require A Business Impact Statement: (☐) Yes (☒) No

Recommended Board Action: I move to continue this matter until the District Attorney's Office has received the Attorney General Opinion.

Explanation for Recommended Board Action:

Judge Willis has expressed his intent to resign his position effective January 4, 2011 as stated in his letter of resignation attached hereto. His term officially ends December 2012.

Normally, candidates would file for this position in January 2012 for a Primary Election to be held June 2012 and, if necessary, the General Election in November 2012 and take office in January 2013.

Judge Willis is concerned that this action needs to be resolved immediately so that the Clerk/Recorder can prepare the list of open offices for the Primary/General Election by the November 17th deadline. However, this would be a Special Election even if the date of the election coincides with the normal Primary/General Election dates of June and November 2010, therefore the dates of activities pertaining to the Primary/General Election do not apply and there is not a need to have the position listed on the November 17th notice.

The District Attorney's Office has found case law that indicates a resignation letter can be rescinded at any time up until re resignation date even if accepted. As a result, the District Attorney has requested an Attorney General Opinion. It is my recommendation that you do not adopt a resolution at this time but wait until the District Attorney has received the Attorney General Opinion.

In the matter of the salary, the Board sets the base salary for the position which then increase per statute for longevity. Again, I would wait on this matter until the issue of the resignation is resolved.

Applicable Statue, Code, Policy, Rule or Regulation: NRS 4.150

Fiscal Impact: There will be annual savings because the new judge would not have the longevity pay.

Explanation of Impact: See above.

Funding Source: N/A

Alternatives:

Supporting Material: Letter of Resignation, NRS 4.150, and NRS 245.170, Request for Attorney General Opinion, E-Mail from the Clerk/Recorder.

Prepared By: Lawrence A. Werner, P.E., P.L.S.

Reviewed By:

(Department Head)

(City Manager)

(District Attorney)

(Finance Director)

Date:

Date:

Date:

Date:

Board Action Taken:

Motion: _____

1) _____

2) _____

Aye/Nay

(Vote Recorded By)

**JUSTICE AND MUNICIPAL COURT OF CARSON TOWNSHIP
CARSON CITY, NEVADA**

JUDGE ROBEY B. WILLIS
Department I

JUDGE JOHN TATRO
Department II



885 East Musser Street
Suite 2007
Carson City, Nevada 89701-4475

MEMORANDUM

TO: Mayor Bob Crowell and Members of the Board of Supervisors

FROM: Robey B. Willis, Justice of the Peace/Municipal Court Judge, Dept. *RBW*

RE: Retirement

DATE: October 19, 2009
(For placement on the November 5, 2009 agenda)

First, I would like to say that during the past 25+ years, I have greatly enjoyed serving Carson City and its citizens. So much so, actually, I cannot envision any other career I would have rather pursued. Thus, it is with mixed feelings that I am notifying you of my pending retirement effective January 4, 2011.

NRS 4.150 allows the Board to fill such a vacancy by appointment or election. I am providing 14 months advance notice so that if the Board decides to fill the position by election, it would occur in 2010. Timing on this matter is critical because Alan Glover, Clerk Recorder, must announce all positions up for the 2010 election on November 15, 2009. Additionally, filing for judgeships must be done from January 4th to the 15th, 2010, as opposed to the spring dates for other positions.

Because of the extensive advance notice, I am hopeful the Board will strongly consider filing it by election so that all interested citizens will have the opportunity to file. If that is your decision, I believe it needs to be made at today's Board meeting so that Mr. Glover can place the position in the public announcement and prepare for filing. This should also provide for a rather seamless transition to coincide with my date of retirement, January 4, 2011, which is the same date as the swearing-in of newly elected public officials.

Before closing, I would like to add that not only has the position itself been a pleasure, but the City entities and staff with whom I deal, particularly the Court staff and the Board of Supervisors, have always gone beyond expectations and provided outstanding cooperation and support.

Please contact me if there are questions or if I can provide additional information.
Thank you.

Telephone: (775) 887-2121 ♦ Facsimile: (775) 887-2297



NRS 4.110 Penalty for failure to comply with statutory requirements. Any justice of the peace who shall violate any of the provisions of NRS 4.080, 4.090 and 4.100 shall be fined not more than \$1,000.
[Part 21:49:1883; BH § 2362; C § 2486; RL § 2023; NCL § 2954]—(NRS A 1967, 528)

NRS 4.120 Punishment for taking excessive fees. If any justice of the peace shall take more or greater fees than are allowed by law, he shall be liable to indictment, and on conviction shall be removed from office and fined in any sum not exceeding \$1,000.
[Part 22:49:1883; BH § 2363; C § 2487; RL § 2024; NCL § 2955]

NRS 4.130 Fee tables to be posted; penalties. Any justice of the peace receiving fees as provided by law shall publish and set up in some conspicuous place in his office a fee table for public inspection. A sum not exceeding \$20 for each day of his omission so to do shall be forfeited, which sum with costs may be recovered by any person by an action before any justice of the peace of the same county.
[Part 23:49:1883; BH § 2364; C § 2488; RL § 2025; NCL § 2956]

NRS 4.140 Fees payable in advance; execution for fees due. All fees prescribed in NRS 4.060, 4.063 and 4.065 must be paid in advance, if demanded. If a justice of the peace has not received any or all of his fees, which are due him for services rendered by him in any suit or proceedings, he may have execution therefor in his own name against the party from whom they are due, to be issued from the court where the action is pending, upon the order of the justice of the peace or court upon affidavit filed.

[Part 25:49:1883; BH § 2366; C § 2490; RL § 2027; NCL § 2958]—(NRS A 1969, 411; 1991, 328, 919, 921; 1993, 1213)

NRS 4.150 Vacancy in office; duty of clerk of board of county commissioners.

1. If any vacancy occurs in the office of justice of the peace, the board of county commissioners shall either:

(a) Appoint a person to fill the vacancy pursuant to NRS 245.170; or
(b) Provide by resolution for an election procedure to fill the vacancy for the remainder of the unexpired term.

2. The clerk of the board of county commissioners of each county shall, within 10 days after a vacancy has occurred in the office of justice of the peace by resignation or otherwise, certify the fact of such vacancy to the Secretary of State.
[Part 31:108:1866; B § 2629; BH § 1666; C § 1812; RL § 2795; NCL § 4795] +
[Part 49:108:1866; A 1933, 165; 1939, 146; 1931 NCL § 4813]—(NRS A 1975, 174; 1997, 1292)

WEST PUBLISHING CO.

Justices of the Peace ↔ 8.
WESTLAW Topic No. 231.
C.J.S. Justices of the Peace § 8.

ATTORNEY GENERAL'S OPINIONS.

Residence within township unnecessary for appointment to office of justice of the peace. If a vacancy occurs in an office of justice of the peace and the county commissioners elect, pursuant to NRS 4.150, to fill the vacancy by appointment, the residency restrictions of NRS 261.050 and 293.1755 do not apply to applicants for the appointment and the county

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[Part 31:108:1866; B § 2629; BH § 1666; C § 1812; RL § 2795; NCL § 4795] + [Part 49:108:1866; A 1933, 165; 1939, 146; 1931 NCL § 4813]—(NRS A 1975, 174; 1997, 1292)

NRS 245.170 Vacancies: Appointment by board of county commissioners; placement of office on ballot under certain circumstances. Except as otherwise provided by specific statute, if a vacancy is declared in any county or township office, except the offices of district judge and county commissioner:

1. Thirty days or more before the date of the close of filing of declarations of candidacy specified in NRS 293.177, and the office is not otherwise scheduled for election at the next ensuing biennial election:

- (a) The board of county commissioners shall appoint a suitable person who is an elector of the county to fill the vacancy until the first Monday of January after the next ensuing biennial election;

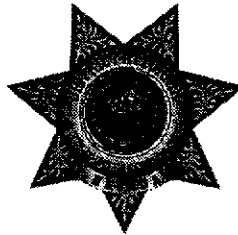
- (b) The office must be placed on the ballot at that election; and

- (c) The person elected shall serve the remainder of the unexpired term.

2. At any other time, the board of county commissioners shall appoint a suitable person who is an elector of the county to serve the remainder of the unexpired term.

[19:80:1865; B § 3087; BH § 1959; C § 2121; RL § 1518; NCL § 1951] + [49:108:1866; A 1933, 165; 1939, 146; 1931 NCL § 4813]—(NRS A 1977, 54; 1997, 1291)

NEIL A. ROMBARDO
District Attorney



GERALD J. GARDNER
Assistant District Attorney

MELANIE BRUKETTA
Chief Deputy District Attorney

**OFFICE OF THE DISTRICT ATTORNEY
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October 12, 2009

Catherine Cortez Masto
Attorney General
100 N. Carson Street
Carson City, Nevada 89701-4717

OCT 13 2009

RE: Request for Attorney General Opinion

Dear Attorney General Cortez Masto:

The Office of the Carson City District Attorney is requesting an Attorney General Opinion regarding the filling of a Justice of the Peace vacancy by resignation. (Please see attached memorandum for the issue, pertinent law, and analysis.)

The Justice of the Peace has asked that this matter be kept confidential for as long as possible. As a result, this Office requests that the Attorney General's Office keep this request as confidential as possible. Thank you in advance for your consideration.

Further, Carson City needs to create its slate of elected positions for the upcoming election by November 17th. Thus, if possible, this Office requests that the Attorney General's Office expedite its opinion, and again, thank you for any consideration you can provide to expediting the AGO.

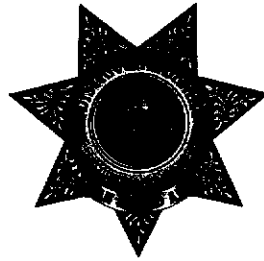
If there are any comments, questions, or concerns, please contact me directly at (775) 887-2070.

Sincere Regards,


NEIL A. ROMBARDO
District Attorney

NAR:bap
Cc: Larry Werner, City Manager
Enclosures

NEIL A. ROMBARDO
District Attorney



GERALD J. GARDNER
*ASSISTANT DISTRICT
ATTORNEY*

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MEMORANDUM

To: Larry Werner, City Manager
From: Neil A. Rombardo, District Attorney
Date: October 12, 2009
Re: Anticipatory election to fill an expected vacancy in an elected office

BACKGROUND

Justice of the Peace Robey Willis plans to resign his elected office effective January 1, 2011. One of the processes proposed to fill the vacancy caused by Justice of the Peace Willis' resignation is for Carson City to conduct an election for the office during the 2010 Primary/General election cycle. Specifically, a primary election will be conducted on June 8, 2010 and, if necessary, a general election will be conducted on November 2, 2010.

ISSUE PRESENTED

Can an election be conducted to fill an elected office vacated by resignation before the effective date of the resignation?

APPLICABLE LAW

1. NRS 4.150 - Vacancy in office; duty of clerk of board of county commissioners.
2. NRS 283.040 - Events causing vacancy in office; action by Attorney General or district attorney.
3. The State of Nevada, Ex Rel. M. E. Ryan, Relator v. M. J. Murphy, Respondent,
30 Nev. 409, 97 P. 391 (1908)

ANALYSIS

The Board of Supervisors has two options for filling a vacancy in the office of justice of the peace. NRS 4.150 sets forth these two methods. NRS 4.150 provides that:

1. If any vacancy occurs in the office of justice of the peace, the board of county commissioners shall either:

(a) Appoint a person to fill the vacancy pursuant to NRS 245.170; or

(b) Provide by resolution for an election procedure to fill the vacancy for the remainder of the unexpired term.

(Emphasis added). The Nevada Supreme Court has not opined as to when the authority of the Board of Supervisors to fill a vacancy occurs. Therefore, the provisions of NRS 4.150 must be construed using the rules of statutory construction. The first rule of statutory construction is that a statute must be given its plain meaning. State of Nevada Employees Ass'n v. Lau, 110 Nev. 715, 717, 877 P.2d 531, 533 (1994). An analysis of the plain meaning of NRS 4.150 shows that the Board of Supervisors has the authority to fill a vacancy when that vacancy occurs. NRS 4.150 provides that the Board of Supervisors may fill a vacancy "if any vacancy occurs." NRS 4.150, however, does not specify when a vacancy in the office of justice of the peace occurs.

NRS 283.040 sets forth when a vacancy occurs in an elected office. NRS 283.040 provides, in pertinent part, that "[e]very office becomes vacant . . . [upon t]he death or resignation of the incumbent." The provisions of NRS 283.040 are silent as when an office is vacant if a resignation is submitted for a date specified in the future. However, the Nevada Supreme Court has held a resignation submitted for a date in the future is not effective until that date occurs. See The State of Nevada, Ex Rel. M. E. Ryan, Relator v. M. J. Murphy, Respondent, 30 Nev. 409, 97 P. 391 (1908), in which the Nevada Supreme Court held that a person submitting a resignation with an effective date in the future is entitled to rescind that resignation, even if accepted, up to the effective date specified. Therefore, if a resignation is submitted for a date specified in the future, the office is not vacant pursuant to NRS 283.030 until that date occurs. If the office is not vacant until the date of effectiveness occurs, then the Board of Supervisors does not have the authority pursuant to NRS 4.150 to fill that office until the effective date of the resignation.

CONCLUSION

The Board of Supervisors cannot conduct an election to fill the office of justice of the peace vacated by resignation before the effective date of the resignation specified by the incumbent. This conclusion is supported by a brief analysis of a potential problem that could occur if the Board of Supervisors attempted to fill a vacancy before the vacancy occurred, even if the incumbent had submitted a resignation for a future date. If the Board of Supervisors conducted an election before the effective date of a resignation, a person would be elected to fill that office. However, under the holding in Ex Rel. Ryan v. Murphy, the incumbent would still have the authority to rescind that resignation up to the effective date specified in the resignation. The situation would occur in which a person was elected to fill an office that was no longer vacant.

Furthermore, a brief examination of the states surrounding Nevada shows that their provisions for the filling of a vacant office supports the conclusion that an election for a vacant office should not occur until the vacancy occurs. In California, the California Constitution expressly provides that the election to fill a vacated judicial office is held at the next election following the vacancy. Cal Const, Art. VI § 16 (2009). The relevant provisions for filling a vacant judicial office Oregon and Washington set forth similar requirements. ORS § 51.260 (2007), Rev. Code Wash. (ARCW) § 3.34.100 (2009).

From: Alan Glover
To: Larry Werner
Date: 10/22/2009 11:41 am
Subject: JP Election

Larry

After talking with Joel Benton we agree that if it is legal, pending a AG opinion, the BOS could set almost any rules they want for filing and dates of the election.

The BOS could set the January or March dates for filing, call for a primary election in June and a general election in November. Does this help?

Alan