

Item # 21c

**Carson City
Agenda Report**

Date Submitted: October 26, 2010

Agenda Date Requested: November 4, 2010

Time Requested: 30 minutes

To: Mayor and Supervisors

From: City Manager

Subject Title: Discussion and possible action on a method to fill the vacancy created by the election of either Supervisor Livermore or Supervisor Williamson to the Nevada State Assembly.

Staff Summary: As detailed in the District Attorney's Opinion of October 14, 2010, one of the two supervisors must resign on November 3, 2010. Carson City Charter Section 2.030 states that the Board of Supervisors must fill the vacancy by appointing a member within 30 days or after 3 meetings, whichever is shorter. To comply with the Charter, the Board must appoint someone by the December 2, 2010 which would be the 3rd meeting and within 30 days. The qualifications of the potential appointee must meet Section 2.010 of the Charter.

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 direct staff to prepare an action item depending on board discussion and recommendations.

Explanation for Recommended Board Action: See staff summary.

Applicable Statute, Code, Policy, Rule or Regulation: Carson City Charter Section 2.010 and 2.030.

Fiscal Impact: None

Explanation of Impact: N/A

Funding Source: N/A

Alternatives:

Supporting Material: DA Opinion No. 10-01

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

Reviewed By:

(Department Head)

(City Manager)

(District Attorney)

(Finance Director)

Date:

Date:

Date:

Date:

10/26/10

10/26/10

10/26/10

Board Action Taken:

Motion: _____

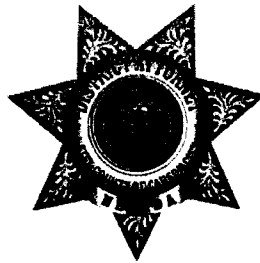
1) _____

2) _____

Aye/Nay

(Vote Recorded By)

NEIL A. ROMBARDO
District Attorney



<http://www.carson-city.nv.us>

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October 14, 2010

Honorable Robert Crowell
Mayor of Carson City
Carson City Hall
201 North Carson Street, Suite 2
Carson City, Nevada 89701

OCT 15 2010

Larry Werner, City Manager
Carson City Hall
201 North Carson Street, Suite 2
Carson City, Nevada 89701

Opinion No. 10-01 Interpretation of various election law issues: A Supervisor may not hold another elected office; a person elected to the state Assembly takes office the day after the election regardless of the canvass, a recount, or a contest; a person may run for elected office as long as at the time of the election he/she has not served 12 or more years in that elected office; and Supervisor Aldean may run for one more term without violating Article 15 §3 of the Nevada Constitution.

Dear Mayor Crowell and City Manager Werner:

A variety of legal questions regarding the upcoming election have been propounded to this office. This opinion will address those issues.

ISSUE PRESENTED

1. Whether a member of the Board of Supervisors (Board) must resign his/her position as a Supervisor upon being elected to the Nevada Assembly (Assembly), and if so, when?

APPLICABLE LAW

NRS 281.055, in pertinent part, states:

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1. Except as otherwise provided in subsection 2, no person may:

(a) . . .

(b) *Hold more than one elective office at the same time.*

2. The provisions of subsection 1 shall not be construed to prevent any person from filing nomination papers for or holding an elective office of any special district (other than a school district), such as an irrigation district, a local or general improvement district, a soil conservation district or a fire protection district, and at the same time filing nomination papers for or holding an elective office of the State, or any political subdivision or municipal corporation thereof.

The Nevada Constitution Article 4, Section 3, in pertinent part, states:

1. The members of the Assembly shall be chosen biennially by the qualified electors of their respective districts, on the Tuesday next after the first Monday in November and their term of Office shall be two years *from the day next after their election.*

2. . . .

(Emphasis Added.)

ANALYSIS

Upon being elected to the Assembly, a successful candidate takes office as a member of the Assembly the day following the election. Nev. Const. Art. 4 §3. NRS 281.055(1)(b) states, that no person may "hold more than one elective office at the same time."

Supervisors Livermore and Williamson are running for Assembly against each other. Their terms as Supervisor end on January 2, 2011. Upon being elected to the Assembly, the successful candidate will take office on November 3, 2010 and would hold two elective offices on that day. To do so, violates NRS 281.055(1)(b) unless

he/she resigns one of the two positions. Therefore, the successful candidate must resign his/her position as either Supervisor or Assemblyperson on November 3, 2010.

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- a. **Does the canvass and abstract of the vote process affect a person elected to the Assembly from taking office the day after the election?**

NRS 293.395, in pertinent part, states that the vote for state legislators will be canvassed by the Nevada Supreme Court the fourth Tuesday of November. Here, the election occurs on November 2nd, the fourth Tuesday of November is November 23, 2010.

In certain specific instances, the canvass of the vote must occur to make the election effective. For example, Nevada Constitution Article 19, Section 2(4) provides that an initiative petition that amends the Nevada Constitution does not take effect until the canvass of the vote is complete. See Child v. Lomax, 124 Nev. Adv. Rep. 57, 188 P. 3d 1103, 1110 [*fn.* 35], 2008 Nev. LEXIS 62, 22, (2008) and Torvinen v. Rollins, 93 Nev. 92, 94, 560 P.2d 915, 917 (1977). However, in the instance of an Assemblyperson, no such specific language exists. In fact, the language for Assemblypersons specifically states, "their term of Office shall be two years from the day next after their election." Nev. Const. Art. 4 §3.

In Child v. Lomax, the Nevada Supreme Court analyzed exactly when an Assemblyperson took office for the purpose of term limits. In that case, the petitioner, Mr. Child, challenged Assemblywoman Buckley's 2008 candidacy. Mr. Child argued that the court should count Ms. Buckley's 1996 election as a part of her 12 years in office. Mr. Child argued that the canvass for the 1996 election occurred on November 27. That canvass included both the amendment to the constitution adding term limits for legislators and Ms. Buckley's election. He, therefore, reasoned that Ms. Buckley did not hold her position in 1996 prior to the amendment taking effect, and those two years should count toward her 12 years in office.

In contrast, Ms. Buckley argued that she held office the day after the election, November 6, 1996, which was 21 days prior to the canvass. She further argued that the constitutional amendment adding term limits applied prospectively because it lacked language making it retrospective citing Torvinen v. Rollins, 93 Nev. 92, 94, 560 P.2d 915, 917, 1977 Nev. LEXIS 482, 4. Thus, she argued her term, which began prior to the amendment taking effect did not apply albeit occurring in the same election.

The Nevada Supreme Court agreed with Ms. Buckley's argument. In doing so, the Court analyzed the papers of Nevada's Constitutional Convention. The delegates at the convention argued the issue of when a state legislator should take office. The

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delegates decided that "in order to 'prevent any abuse of the power by the Executive of the State' in the event a special session is called in the interim between the election and the canvass of the votes" members of the legislature should take office the day after the election. Child at 1109-1110, 19-21. Therefore, the Court held that an Assemblyperson takes office the day after the election, and in this case, Ms. Buckley was not barred by term limits since she took office prior to the constitutional amendment's effectiveness.

Here, as already stated, unless a Supervisor the day after the election resigns his/her position as a Supervisor or Assemblyperson, he/she will be violating NRS 281.055. Therefore, the successful candidate must resign one of his/her two elected positions on November 3, 2010 regardless of the canvass of the vote or be in violation of the law.

b. Does a recount affect a person elected to the Assembly from taking office the day after the election?

NRS 293.403 states that a candidate must demand a recount within 3 working days from the canvass of the vote and the certification of the abstract by the Clerk. NRS 293.404 and 293.405 establishes the process for a recount¹.

NAC 293.365(1) states, "The results of a recount of any election demanded pursuant to NRS 293.403 must be canvassed within 5 working days after the completion of the recount." NAC 293.365(2) states that the recount must follow the same canvass procedure as if a recount did not occur. Since the canvass of an election does not effect when a member of the Assembly takes office, it is only logical to conclude that a recount that follows the same canvass procedure would not effect when a member of the Assembly takes office. See Child v. Lomax, 124 Nev. Adv. Rep. 57, 188 P. 3d 1103, 1111 2008 Nev. LEXIS 62, 25-26 (2008).

c. Does a contest affect a person elected to the Assembly from taking office the day after the election?

NRS 293.410(2) states an election may be contested for the following reasons:

- (a) That the election board or any member thereof was guilty of malfeasance.

¹The process of a recount is not relevant to the analysis of this opinion. It is important to note, however, that the recount process is in effect an administrative type process to ensure accuracy of an election, and it is not a contest between candidates. Op. Nev. Att'y Gen. 175 (11-25-1974).

- (b) That a person who has been declared elected to an office was not at the time of election eligible to that office.
- (c) That illegal votes were cast and counted for the defendant, which, if taken from the defendant, will reduce the number of the defendant's legal votes below the number necessary to elect the defendant.
- (d) That the election board, in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person who has been declared elected.
- (e) That the defendant has given, or offered to give, to any person a bribe for the purpose of procuring his or her election.
- (f) That there was a possible malfunction of any voting or counting device.

NRS 293.423 states:

Recount of ballots at hearing of contest. At the hearing of any contest, the ballots may be opened and a recount made, in the presence of the parties or their representatives, of the votes cast for the various candidates for the contested office.

NRS 293.427, which provides the process for a contest of an election for a state legislator, provides, in pertinent part:

- (1) . . .
- (2) Until the contest has been decided, the candidate who received the highest number of votes for the office in the contested election must be seated as a member of the appropriate house.
- (3) . . .
- (4) The contest, if not dismissed, must be heard and decided as prescribed by the standing or special rules of the house in which the contest is to be tried. If after hearing the contest, the house decides to declare the contestant elected, the Governor shall execute a certificate of election and deliver it to the contestant. The certificate of election issued to the other candidate is thereafter void.

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(5) . . .

The Assembly adopts standing and special rules of the Assembly as a resolution at the start of the each session. The last rules adopted for the 2009 session established procedure for a contest. Assembly Resolution 1, Rule No. 45 (2009). These rules indicate that the Assembly makes a determination on the contest, which may involve a recount, during the session itself. Therefore, a contest would not effect who must resign the Supervisor seat because the law presumes that the person with the most votes the day after the election properly holds the seat until the Assembly determines otherwise. NRS 293.427(2).

ISSUE PRESENTED

2. If the Board appoints the Supervisor-elect from the 2010 general election to fill a position vacated by a resigning Supervisor elected to the Assembly, does that appointment effect the appointee's term limits?

APPLICABLE LAW

Carson City Charter Section 2.030 states:

Sec. 2.030 – Board of Supervisors: Vacancies.

1. A vacancy in the office of Supervisor must be filled by appointment by a majority of the members of the board within *30 days* after the occurrence of the vacancy or after three regular or special meetings, whichever is the shorter period of time. . . .

2. No such appointment extends beyond the first Monday in January after the next general election, at which election a new Supervisor must be elected to fill the unexpired term.

(Emphasis added.)

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The Nevada Constitution states:

No person may be elected to any state office or local governing body who has served in that office, or at the expiration of his current term if he is so serving *will have served*, 12 years or more, unless the permissible number of terms or duration of service is otherwise specified in this Constitution. Nev. Const. Art. 15, §3(2).

(Emphasis added.)

ANALYSIS

In 2007, the Storey County District Attorney inquired of the Attorney General's Office whether Mr. Hess, a County Commissioner, could run for his current position although he had already served 10 years as a Commissioner. Op. Nev. Att'y Gen. No. 07-04, 2007 Nev. AG LEXIS 4 (2007). The Attorney General analyzed the term limit provision of the Nevada Constitution, Article 15 §3. Particularly, the Attorney General analyzed the language that stated "will have served" 12 years or more at the time of the election. The Attorney General's Office opined:

The term limitation found in NEV. CONST. ART. 15, § 3(2) of the Nevada Constitution does not prohibit Mr. Greg Hess of the Storey County Commission from seeking another four-year term in 2008, since at the time of the election in 2008, Mr. Hess will have served a total of ten years in the office, which is fewer than the 12 years in office at that time or at the end of his current term which would bar him from seeking re-election.

In separate unrelated opinions the Nevada Supreme Court adopted the same analysis as the Attorney General. See Miller v. Burk, 124 Nev. Adv. Rep. 56, 188 P.3d 1112, 1120, 2008 Nev. LEXIS 64, 20 (2008) and Child at 1111, 26.

Here, it is presumed the successful candidate for Assembly will resign his/her seat as a Supervisor on November 3rd, 2010. The Board must appoint someone to fill that vacancy no later than December 3, 2010. Carson City Charter §2.030(1). If the Board chooses to appoint the Supervisor-elect to fill the vacancy, he/she will have served at least 32 days in office prior to the term he/she was elected to fulfill. The Supervisor-elect may run for office again in 2014. If he/she is successful in 2014 and chooses to run for office again in 2018, he/she will have served 8 years and at least 32

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days in office, which is less than 12 years. As a result, the Board may appoint the Supervisor-elect to fill the vacancy left by a resigning Supervisor, and that person may run for that position in 2018 without violating the term limit provision of the Nevada Constitution.

ISSUE PRESENTED

3. Whether Supervisor Aldean may run for a 3rd term without violating Article 15, §3 of the Nevada Constitution limiting the terms of a member of a governing body?

ANALYSIS

Supervisor Aldean was appointed to the Board to fill the vacancy left by Supervisor Plank on January 24, 2003. Supervisor Aldean was re-elected in November of 2004 and 2008. If she was to run for Supervisor again in 2012, she would have less than 12 years in office, and as a result, she would not be in violation of the term limits provision found in the Nevada Constitution.

CONCLUSION

A Supervisor may not hold another elected office. If a Supervisor is elected to the Assembly, he/she takes office the day after the election regardless of the canvass, a recount, or contest. He/she must, therefore, resign one of his/her elected positions the day after the election. Further, a person may run for elected office as long as at the time of the election he/she has not served 12 or more years in that elected office, and finally, Supervisor Aldean may run for Supervisor in 2012 without violating Article 15 §3 of the Nevada Constitution.

Sincere regards


NEIL A. ROMBARDO
District Attorney

NAR:bap
cc: Shelly Aldean, Supervisor Ward 2