

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

AGO 2005-02 CITIES AND TOWNS: ELECTIONS: NRS 293C.115 does not violate the prohibition contained in Nev. Const. art. 15, § 11 against the legislative creation of an office with a term of more than four years.

Carson City, February 8, 2005

Paul G. Taggart, Fernley City Attorney, 108 North Minnesota Street, Carson City, Nevada 89703

Dear Mr. Taggart:

You have asked a question concerning the constitutionality of NRS 293C.115.

QUESTION

Is NRS 293C.115 constitutional in light of the prohibition contained in Nev. Const. art. 15, § 11 against the legislative creation of an office with a term of more than four years?

ANALYSIS

During the 2003 Legislative Session, the Legislature passed enabling legislation to allow certain cities to change their election dates to coincide with the statewide General Election. Your inquiry is limited to whether the City of Fernley (Fernley) may lawfully hold its next general election in November 2006 and that question turns on whether NRS 293C.115 is a constitutional enactment. NRS 293C.140(1) provides in relevant part:

Except as otherwise provided in NRS 293C.115, a general city election must be held in each city of population categories one and two on the first Tuesday after the first Monday in June of the first odd-numbered year after incorporation, and on the same day every 2 years thereafter as determined by law, ordinance or resolution, at which time there must be elected the elective city officers, the offices of which are required next to be filled by election. [Emphasis added.]

You have indicated that Fernley is a city whose population is within the two population categories encompassed by NRS 293C.140. Accordingly, but for the exception found in NRS 293C.115, Fernley would be required to hold its general city elections in June of odd-numbered years, or June 2005 in the instant case.

NRS 293C.115 provides in relevant part:

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1. The governing body of a city incorporated pursuant to general law may by ordinance provide for a . . . general city election on:

(a) The dates set forth for . . . general elections pursuant to the provisions of chapter 293 of NRS; . . .

. . . .

3. If a governing body of a city adopts an ordinance pursuant to subsection 1:

(a) The term of office of any elected city official may not be shortened as a result of the ordinance; and

(b) Each elected city official *holds office until the end of his term and until his successor has been elected and qualified.*

[Emphasis added.]

Fernley is an incorporated city to which NRS 293C.115 applies.

You have indicated that Fernley has passed an ordinance pursuant to NRS 293C.115(1) to set its general elections as scheduled in chapter 293 of NRS. NRS 293.12755 provides: “A general election must be held throughout the State on the first Tuesday after the first Monday of November in each even-numbered year.” In combination with the requirement of NRS 293C.115(3)(b), the effect of the ordinance is to extend the incumbency of Fernley elected officials from June 2005 to November 2006. You question whether this extension of incumbency conflicts with Nev. Const. art. 15, § 11, which provides in relevant part:

The tenure of any office not herein provided for may be declared by law, or, when not so declared, such office shall be held during the pleasure of the authority making the appointment, *but the legislature shall not create any office the tenure of which shall be longer than four (4) years . . .* [Emphasis added.]

This office has succinctly restated the requirement of the constitutional provision: “[w]here an office is created by the Legislature, the term of such office may not exceed four years.” Op. Nev. Att’y Gen. No. 1929—326 (March 15, 1929). An example of a statutory enactment which violated Nev. Const. art. 15, § 11 follows.

In *Davenport v. Harris*, 19 Nev. 222, 223—224 (1885), the court considered a statutory provision which purportedly created a five-year term for

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certain school trustees. The specific language under consideration was, "one trustee shall be elected annually to hold office for three years where there are three trustees, *and for five years where there are five trustees*, or until his successor shall be elected and qualified." [Emphasis added.] The parties and the court acknowledged that the enactment violated Nev. Const. art. 15, § 11:

It is admitted that the provision which declares that the term of trustee shall be five years in boards of five trustees is in conflict with the constitutional prohibition declaring that 'the legislature shall not create any office the term of which shall be longer than four years,'

Accordingly, where the Legislature creates an office with a term of more than four years, the enactment conflicts with the constitutional provision. But the instant case involves an enactment which does not specifically affect the length of the office, which remains at four years. Instead, NRS 293C.115 provides that the incumbents of the subject city offices shall hold over until the November 2006 general city election, as provided by ordinance. This Office had occasion to examine the constitutional provision in a similar context in 1911, as follows.

The four-year tenure of office of the Chairman of the Publicity Commission, Mr. Davis, had elapsed, yet he held over as Chairman for one month after the expiration of his term of office. Mr. Davis subsequently filed his claim for one-months' salary, \$208.33. In interpreting Nev. Const. art. 15, § 11, we stated:

The tenure of the office under consideration was, in unmistakable terms, limited to a period of four years. But it must be borne in mind that *there is a distinction between the tenure of the office and the office itself*. In this instance, the *tenure* was for a period of four years; yet as to *the existence of the office itself*, there was no limitation placed by the legislature, the office continuing to exist after the expiration of the appointment of the Chairman.

Op. Nev. Att'y Gen. No. 1911—24 (July 6, 1911) (emphasis added). We concluded that Mr. Davis's holding over of the office did not constitute a violation of Nev. Const. art. 15, § 11.

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The case of *State ex rel. Harrison v. Menaugh*, 51 N.E. 117 (Ind. 1898), adds weight to the argument that the incumbency-extension provision of NRS 293C.115 is not in conflict with Nev. Const. art. 15, § 11. In *Menaugh*, the court considered a statutory provision which extended the date of an election for township trustees and therefore continued their incumbency past a constitutional four-year term limit. In upholding the constitutionality of the enactment as a valid exercise of legislative power, the court clarified:

Counsel for appellant seem especially to base their contention on section 2 of article 15 of the constitution, which, as we have seen, prohibits the legislature from creating any office the tenure of which shall be longer than four years, and their insistence is that this restriction will prevent the act in question from being upheld. It is manifest, we think, that this contention is wholly untenable. *An examination of the act will readily disclose that it does not profess to create the office of township trustee, nor to extend the term thereof beyond the constitutional limit.* It proceeds upon the theory that the office has been previously created, and it merely declares as the legislative will that the time of holding an election for township trustees, etc., shall be changed from the general election on the first Tuesday after the first Monday in November, 1898, to the general election on the first Tuesday after the first Monday in November, 1900, and on such day 'of every fourth year thereafter.'

See Harrison v. Menaugh, 51 N.E. at 121 (emphasis added). In a subsequent and different case, *citing Menaugh*, the Indiana Supreme Court further explained the difference between a statutory extension of an election and a statutory provision which directly extends the term of the office of an incumbent:

We think the decision in *State ex rel. [sic] v. Menaugh* is controlling in this. Moreover, the general rule is that it is within the province of the Legislature to postpone elections and readjust the commencement of the terms of offices, such as are of legislative creation

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particularly, in which case the incumbents may either hold over, or special elections may be authorized to fill the vacancies thus occasioned until the next general election. Such statutes are not considered in violation of the Constitution, where the object is to regulate the time of holding elections, and not merely to extend the terms of incumbents; but, if the legislative intent is clearly to extend the terms of present incumbents in office, the act will fall under the ban of the constitutional provision. (Citations omitted.)

Spencer et al. v. Knight, 98 N.E. 342, 346 (Ind. 1912) (citations omitted).

NRS 293C.115 does not create an office longer than four years, nor does it directly extend the term of office of incumbent city officers, such as the statute struck down in *Davenport*. Rather, NRS 293C.115 recognizes the permissible four-year terms of city offices, but allows the incumbents to hold over until the next General Election. The statute is clearly aimed only at postponing a general city election and, under the above authorities, does not violate the provision of Nev. Const. art. 15, § 11 which prohibits the creation of an office with a term of more than four years. Finally, if any doubt remains as to the constitutionality of the statute, the presumption enunciated in *Citizens for Honest & Responsible Government v. Heller*, 116 Nev. 939, 11 P.3d 121 (2000), comes into play to support NRS 293C.115's constitutionality: "An act is presumed to be constitutional and will be upheld unless the violation of constitutional principles is clearly apparent." *Id.* at 946 (citations omitted).

CONCLUSION

NRS 293C.115 does not violate the prohibition contained in Nev. Const. art. 15, § 11 against the legislative creation of an office with a term of more than four years.

Sincere regards,

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