BILL NO. 2001-1

ORDINANCE NO. 150

An ordinance relating to the Municipal Elective Office; amending Chapter 12, section 12.020 of the Municipal Code of the City of Caliente, Nevada, (August 1991 Publication), by adding a new subsection to establish limitations on the ability of certain elected and appointed City officials to seek elective office; Providing for other matters properly relating thereto; and repealing all ordinances or parts of ordinances in conflict herewith:

Sponsored by

Mayor Kevin J. Phillips

Summary:

Amends Chapter 12, (Municipal Elections) Section 12.020 of the Caliente Municipal Code to add a new provision establishing limitations on certain elected and appointed City officials to seek elective office.

THE CITY COUNCIL OF THE CITY OF CALIENTE DOES ORDAIN AS FOLLOWS:

Section 1 of Ordinance 150: Chapter 12, section 12.020 of the Municipal Code of the City of Caliente. As published in 1991, is hereby amended as follows:

1. The elective officers of the City of Caliente shall consist of:

   (a) A Mayor, and
   (B) Four councilmen. [1971 Charter, Sec. 1.050(1), as amended, Chapter 71, Statutes of Nevada 1975]

2. All elective officers, and candidates for such offices, shall meet the following qualifications:

   (a) Be a qualified elector within the city.
   (b) Have been an actual and bona fide resident of the city for not less than two (2) years next preceding his election. [1957 Charter, Sec. 6, as amended; 1971 Charter Secs. 1.050(1). 2.101(2)]

MEMORANDUM

TO: **City of Caliente**

FROM: **John C. Brown, Esq.**

DATE: **March 31, 2009**

RE: **Limitation of Councilmembers' Right to Seek Office of Mayor**

The Equal Protection Clause of the Fourteenth Amendment states as follows: "No State shall...deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment not only governs actions by state governments, but also by any of its political subdivisions, including counties, regional commissions and cities.

That said, legislation frequently involves making classifications that either disadvantage or benefit a specific group of persons. For example, 18-year-olds are allowed to drive, but 12-year-olds are not. Indigent single parents can receive government financial aid, but millionaires are usually denied such government funds. A local government cannot deny the right to vote to an American citizen whose parents came from France, but that same political subdivision can deny the right to vote to an individual from France who is not an American Citizen. All of these disparate treatments are permissible. Thus, clearly the Equal Protection Clause cannot mean that government is obligated to treat all persons exactly the same. Which begs the question, "under what circumstances must government treat persons the same?"

Over the recent decades, the Supreme Court has developed a three-tiered approach to analysis under the Equal Protection Clause: strict scrutiny, intermediate scrutiny and rational basis scrutiny.

The courts apply strict scrutiny to classifications burdening certain fundamental rights, such as marriage and procreation, and the right to own and possess property, as well as classifications based on race or religion. Intermediate scrutiny is used when the courts are faced with classifications involving quasi-suspect groups of individuals such as those belonging to the same gender, or age group. Finally, rational basis scrutiny is used in almost all other cases.

Laws that require strict scrutiny by the courts are almost always overturned. Rarely do Judges allow limitations or restrictions on fundamental rights or allowing for the disparate treatment of different races; and then, only under very certain, limited circumstances. Likewise, statutes and ordinances necessitating intermediate scrutiny are also, generally, overturned. Sometimes a law that treats one gender differently, or that discriminates on the basis of age, can be permitted, but only if the legislative body that enacted the law had a very good purpose, there was no other way to accomplish its purpose without passing this law and/ or the law was directly related to the purpose at issue.

For the most part, however, most of the case law dealing with equal protection under the Fourteenth Amendment, concerns laws that require rational basis scrutiny. Indeed, most classifications are subject only to rational basis review. A plurality of United States Supreme Court Justices stated that regulations satisfy the equal protection requirement, and are therefore legally permissible, if there is a "state of facts" that "could

provide a rational basis for the classification." This seems to be the minimum standard. In order for a law that classifies persons and creates disparate treatment to pass Constitutional muster, there must be an articulated rational basis for the classification.

There appears to be a decision from the United States Supreme Court that is very much "on point," the *Clements v. Fashing* case. In Clements, public officials, Texas citizens and registered voters brought action challenging the constitutionality of a provision of Texas Constitution that rendered an officeholder ineligible for the state legislature if the officeholder's current term of office would not expire until after the legislative term to which he was seeking election began. For example, if a county commissioner wanted to run for state legislature, he would have to wait until his term was ending before he could run for the legislative seat. This constitutional section was known as the "resign-to-run" or "automatic resignation" provision, under which a wide range of state and county officeholders were compelled to resign if they become a candidate for another office at a time when their unexpired term would not end before the new term of office began.

The United States District Court for the Western District of Texas found that the challenged provisions violated the equal protection clause of the Fourteenth Amendment. The Court of Appeals for the Fifth Circuit also agreed that the provision was unconstitutional. The Supreme Court, Justice Rehnquist, joined by the Chief Justice and two other Justices, concluded that the relevant portion of the Texas Constitution and that the burden imposed by the "automatic resignation" provision did not violate the equal protection clause.

Notably, although only three other Justices agreed with Justice Rehnquist's reasoning, the Court held that the provision was constitutional. For informational purposes, a plurality is a minority of Justices who provide reasoning for the Court, when there is no majority opinion.

Specifically, Rehnquist and the plurality in the Clements case stated that the Fourteenth Amendment allows a state or local legislative entity considerable leeway to enact legislation that may appear to affect similarly situated people differently. Indeed, such entities are ordinarily assumed to have acted constitutionally. Rehnquist stated that the ability to hold public office was not a fundamental right and that there were no suspect or quasi-suspect classes involved, thus, the distinctions or classifications in this case would be examined using rational basis scrutiny, or the lowest level of scrutiny.

Accordingly, using rational basis scrutiny, Rehnquist stated that "distinctions need only be drawn in such a manner as to bear ***some rational relationship to a legitimate state end***." He continued, stating that classifications are usually set aside only if they are based "solely on reasons totally unrelated to the pursuit of the State's goals" or if no grounds can be stated "to justify them."

In the *Clements* case, as Rehnquist pointed out, the State had provided a rational basis for the constitutional provision, and had articulated a reasonable justification for the classification. Therefore, Rehnquist and the plurality believed that the limitation was constitutionally permissible. Texas had provided a "state of facts" that "could provide a rational basis for the classification" and therefore was compliant with the minimum requirements of the Fourteenth Amendment.

The Justice who agreed with Rehnquist and the Plurality, as well as the Dissenting Justices, believed that the standard employed by Rehnquist was not strict enough. In fact, Justice Stevens, who agreed with the result of this case, argued that

Rehnquist's "minimum standard" amounted to "no review at all." Moreover, the Dissent asserted that the right to seek public office is guaranteed by the First Amendment and the classification and interference with this right should not be subject to rational basis scrutiny, at all.

Therefore, while it is unclear where the exact standard lies when evaluating the limitations on a group of persons' right to seek political office, it is clear that the minimum standard is, at least, **a statement of facts or articulated reason that could provide for a rational basis for the classification**.

In specifically evaluating Caliente's ordinance, it would seem, on its face, that Caliente's law is similar to the Texas Constitutional provision and that, therefore, it should likewise be a permissible classification. However, the big difference is that the City has no clear reason that could provide for a rational basis for the ordinance. Thus, while Texas could always argue that it had good reasons for its restrictions and therefore met the "minimum standard," Caliente does not even meet that low standard.

Moreover, there are significant potential conflicts of interest with the Caliente ordinance. Specifically, there is a real potential for the City Counsel to prevent one of its number from fulfilling his or her duties as a Councilmember, by using this ordinance in a Machiavellian manner; seeking to further its own power at the expense of another person or entity. There was no such implication or insinuation in the *Clement's* case.

Thus, for this and other reasons, it is my opinion that the City council vote to amend and remove the applicable provision of the ordinance in question.

3. *No elected official or official serving as an appointee on a city board shall be eligible to file for election to any other City office without first having submitted a resignation from his or her current position with the City. The resignation shall become effective upon the date the person elected to the office filed for takes the oath of office.*

Section 2 of Ordinance 150: If any section, subsection, subdivision, paragraph, sentence, clause or phrase in this ordinance or any part thereof, is for any reason held to be unconstitutional or invalid or ineffective by any court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this ordinance or any part thereof.

The City Council of the City of Caliente, Nevada hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase thereof irrespective of the fact that any one or more section, subsection, subdivision, paragraph, sentence, clause or phrase be declared unconstitutional, invalid or ineffective.

Section 3 of Ordinance 150: All ordinances or parts of ordinances, sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases contained in the Municipal Code of the City of Caliente, Nevada, 1991 publication, in conflict hereby are hereby repealed.

Section 4 of Ordinance 150: This Ordinance shall take effect immediately upon passage hereof.

PASSED, ADOPTED AND APPROVED THIS 1st **DAY OF** March **, 2001.**

Approved:

Kevin J. Phillips, Mayor

Attest:

Linda Welch, City Clerk

The above and foregoing ordinance was first proposed and read by title to the City Council on the 1st day of February, 2001. City of Caliente Bill 2001-1, Ordinance 150 was published in the Lincoln Count Record on 02/08/01 **and** 02/15/01 **.**