



City of Daytona Beach Shores

"Life is Better Here"

"A Premier, Friendly Place to Be"

AGENDA CITY COMMISSION WORKSHOP JANUARY 9, 2024

**5:00 PM, Shores Community Center, 3000 Bellemead Drive
Daytona Beach Shores, FL 32118**

Upon being recognized, a member of the public shall proceed to the podium and give his or her name and address and may, thereafter, speak for a maximum of three minutes on any matter relevant to a specific agenda item. During "Audience Comments," a member of the public may speak on any matter relevant to City business which is not on the agenda, for a maximum of three minutes in accordance with Section 2-1.1(d) and 2-2 of the City Code. In accordance with Section 2-2, during periods set aside for public discussion any person desiring to speak shall secure a form located at the agenda table, complete the form and present it to the City Clerk so the speaker can be recognized by the presiding officer. The use of profanity, obscene language, threats or any violent or abusive conduct by any person shall constitute a violation of this section. It shall be the duty of the Director of Public Safety, upon the order of the presiding officer at any such meeting, to forcibly, if necessary, evict any person violating the provisions of this section from the Commission Chambers. Any such violation shall subject the offender, upon conviction thereof, to a fine and/or imprisonment as prescribed by Section 1-8.

- 1. CALL TO ORDER BY MAYOR**
- 2. ROLL CALL BY CITY CLERK**
- 3. NEW BUSINESS:**
 - A. Discussion on the procedure for filling vacancies on the City Commission
- 4. ADJOURNMENT:**

ANY PERSON WHO DECIDES TO APPEAL ANY DECISION MADE BY THE CITY COUNCIL WILL NEED A RECORD OF THE PROCEEDINGS, AND FOR SUCH PURPOSE HE OR SHE MAY NEED TO ENSURE AT HIS OR HER OWN EXPENSE FOR THE TAKING AND PREPARATION OF A VERBATIM RECORD OF ALL TESTIMONY AND EVIDENCE OF THE PROCEEDINGS UPON WHICH THE APPEAL IS TO BE BASED.

NOTE: IF YOU ARE A PERSON WITH A DISABILITY WHO NEEDS AN ACCOMMODATION IN ORDER TO PARTICIPATE IN THIS PROCEEDING, YOU ARE ENTITLED, AT NO COST TO YOU, TO THE PROVISION OF CERTAIN ASSISTANCE. PLEASE CONTACT THE CITY CLERK FOR THE CITY OF DAYTONA BEACH SHORES, 2990 S. ATLANTIC

AVENUE, DAYTONA BEACH SHORES, FLORIDA 32118, TELEPHONE NUMBER 386-7635364, CSCHWAB@CITYOFDBS.ORG, AS FAR IN ADVANCE AS POSSIBLE, BUT PREFERABLY WITHIN 2 WORKING DAYS OF YOUR RECEIPT OF THIS NOTICE OR 5 DAYS PRIOR TO THE MEETING DATE. IF YOU ARE HEARING OR VOICE IMPAIRED, CONTACT THE RELAY OPERATOR AT 711 or 1 8009558771.

UPON REQUEST BY A QUALIFIED INDIVIDUAL WITH A DISABILITY, THIS DOCUMENT WILL BE MADE AVAILABLE IN AN ALTERNATE FORMAT. IF YOU NEED TO REQUEST THIS DOCUMENT IN AN ALTERNATE FORMAT, PLEASE CONTACT THE CITY CLERK WHOSE CONTACT INFORMATION IS PROVIDED ABOVE.



**CITY COMMISSION AGENDA MEMORANDUM
JANUARY 9, 2024 AGENDA**

TO: Honorable Mayor and Members of the City Commission

FROM:

PREPARED BY: Cheri Schwab, City Clerk

SUBJECT: Discussion on the procedure for filling vacancies on the City Commission

SYNOPSIS:

FISCAL IMPACT STATEMENT:

BACKGROUND:

LEGAL REVIEW:

RECOMMENDATION:

SUGGESTED MOTION:

ATTACHMENT: 1. Opinion - Filling of city commissioner open seat - 2024 - 1-3-24 updated

M E M O R A N D U M

TO: Kurt Swartzlander, City Manager, City of Daytona Beach Shores
COPIES: Mayor and City Commissioners
FROM: Gretchen R. H. (“Becky”) Vose, Esq., City Attorney
DATE: January 2, 2024
SUBJECT: Process for Filling Vacant Positions of City Commissioner

Two of the City Commissioners of Daytona Beach Shores recently submitted their resignations and you have asked me to analyze the proper process for the filling of the vacant City Commission seats. One of the vacant seats (Seat 2, that formerly was held by Commissioner Bryan) has a remaining term of approximately one year, while the other vacant seat (Seat 3, that formerly was held by Commissioner Lindauer) has a remaining term of approximately 3 years. My analysis follows.

Charter Provision

Section 2.05 of the Daytona Beach Shores Charter states:

Sec. 2.05. Filling of vacancies.

The unexpired term of a vacated seat of a Commissioner or the Mayor shall be filled at the next Municipal General Election to be held by the Volusia County Supervisor of Elections when held in odd years or the next State General Election to be held in November of even years.

For the interim period until the General Election at which a vacancy in the office of a Commissioner or a Mayor, vacancies in the office of Commissioner or a Mayor shall be filled within thirty (30) days by the appointment of a successor by the majority vote of the remaining members of the City Commission. If the majority of the remaining members of the City Commission fail to fill the vacancy through appointment within the thirty-day period, a special election to fill the vacancy shall be called and held in a manner coordinated by the City Clerk with the Supervisor of Election and adopted by resolution of the City Commission.

Should the City Commission fail to provide for an election within the time required by this Charter, such election may be ordered by any court of competent jurisdiction.

The qualifying for candidates for a special election to fill a vacancy shall be the same as provided for regular elections in this Charter.

Any successor who fills a vacancy, whether by appointment or election, must have and possess all of the qualifications established by this Charter for the office being filled.

Although the two vacant City Commission positions have unexpired terms of different lengths, the persons appointed to fill the two positions would each only serve the same period of time – until the swearing in of newly elected City Commissioners following “the next State General Election to be held in November [2024].” At the November 2024 State General Election, a city election would be held to fill both of those seats – one for a full four year term (for the seat vacated by Commissioner Bryan) and the other for a two year term (the remaining term of former Commissioner Lindauer). Of course, any person who is appointed to fill either of the now vacant seats, could run for either of the two vacant seats to be filled in the November, 2024 election.

“Qualifications” for persons appointed

Section 2.02 of the Daytona Beach Shores Charter establishes the following minimum qualifications to hold the office of City Commissioner in the City of Daytona Beach Shores:

- 1) registered elector in the City
- 2) six (6) months residency in the City

Section 6.01 of the Daytona Beach Shores Code of Ordinances provides:

Sec. 6.01. – State election law applicable.

All general laws of Florida relating to elections and the registration of persons qualified to vote therein which are not in conflict with this charter shall be the same for the City of Daytona Beach Shores, [and] are hereby adopted as parts hereof.

Therefore, if an issue is not expressly provided for in the Charter or Ordinances of the City concerning elections including, but not limited to qualifications for office, the applicable state law is controlling. The Florida Election Code is found in Chapter 97, Florida Statutes. Although the regulations of municipal elections is referred to as subject to Section 100.3605, that statutory section refers back to Chapter 97 regulations.

Since a person must be a “registered elector” according to Section 2.02 of the City of Daytona Beach Shores Charter and Section 6.01 of its Code of Ordinances adopts by reference Chapter 97, Florida Statutes, voter qualifications included in Section 97.041 would apply to persons seeking to hold office as a City Commissioner in the City of Daytona Beach Shores. Section 97.041 states:

Section 97.041 Qualifications to register or vote.—

- (1)(a) A person may become a registered voter only if that person:
 1. Is at least 18 years of age;
 2. Is a citizen of the United States;

3. Is a legal resident of the State of Florida;
4. Is a legal resident of the county in which that person seeks to be registered;
and

5. Registers pursuant to the Florida Election Code.

(b) A person who is otherwise qualified may preregister on or after that person's 16th birthday and may vote in any election occurring on or after that person's 18th birthday.

(2) The following persons, who might be otherwise qualified, are not entitled to register or vote:

(a) A person who has been adjudicated mentally incapacitated with respect to voting in this or any other state and who has not had his or her right to vote restored pursuant to law.

(b) A person who has been convicted of any felony by any court of record and who has not had his or her right to vote restored pursuant to law.

(3) A person who is not registered may not vote.

Furthermore, Section 97.051 requires that a person be willing to take an oath after registering to vote. Section 97.051 states: "A person registering to vote must subscribe to the following oath: "I do solemnly swear (or affirm) that I will protect and defend the Constitution of the United States and the Constitution of the State of Florida, that I am qualified to register as an elector under the Constitution and laws of the State of Florida, and that all information provided in this application is true."

In summary, the **minimum** criteria for a person to hold office as a City Commissioner in the City of Daytona Beach Shores is that the person:

A . Is registered as a voter of the City according to the Volusia County Supervisor of Elections and therefore:

1. Is at least 18 years of age;
2. Is a citizen of the United States;
3. Is a legal resident of the State of Florida;
4. Is a legal resident of the county in which that person seeks to be registered; and
5. Registers pursuant to the Florida Election Code.
6. Is not a person who has been adjudicated mentally incapacitated with respect to voting in this or any other state and who has not had his or her right to vote restored pursuant to law.
7. Is not a person who has been convicted of any felony by any court of record and who has not had his or her right to vote restored pursuant to law; and

B. Has been a resident of the City of Daytona Beach Shores for six (6) months.

"Vacancies ... shall be filled ... by the appointment of a successor by the majority vote of the remaining members of the City Commission."

The City Commission has scheduled a workshop to be held beginning at 5:00 P.M. on Tuesday, January 9, 2024, to consider the process of appointing two new City Commissioners to fill the existing vacancies. Because the City is required by the Charter to appoint the new City

Commissioners within thirty (30) days after the vacancy occurs, time is of the essence. Special elections can be very expensive. Particularly since there are only three remaining City Commissioners, all City Commissioners must be present for a meeting to be held and a vote taken. Due to the potential that one or more of the remaining City Commissioners might be unable to attend a future meeting within the allotted thirty (30) days (due to illness or other reason), I recommend that, if possible, the appointments of the two new City Commissioners take place at the regular City Commission meeting scheduled for 6:00 P.M. on January 9, 2024.

Under Florida law there are no required processes that must be followed (unless such processes are mandated by Charter or code provision) for the appointment to fill a vacant City Commission position. Any person considered for appointment though must be “qualified” based on the factors set forth in detail above.

It is recommended that the remaining City Commissioners be prepared on January 9, 2024, to nominate one or more possible appointees, and confirm with the Supervisor of Elections the qualifications to serve of any potential appointee. Of course, it would also be important to ensure that the possible appointee is willing to serve in the position prior to any nomination. Because many people may not be aware of the newly imposed requirement to file Commission on Ethics Form 6 for City Commissioners, it would be appropriate to point out that fact to anyone approached as a possible appointee. They should also be told that their appointment would only be until the swearing in of newly elected City Commissioners at the end of 2024, but that they could run for reelection for any seat up for election at that time.

Assuming that the City Commission wishes to take action on January 9, 2024, to appoint two new City Commissioners to fill the existing vacancies, it is suggested that the “process” of filling the vacancies be discussed at the 5:00 P.M. workshop. No votes can be taken at a workshop, so it is suggested that only a discussion take place as to a process to be followed at that time. At the following regular meeting of the City Commission, (at 6:00 P.M. that same day) there will be two related items on the agenda – i) process to be followed for appointment to fill vacancies; and ii) consideration of the filling of vacancies for Seat 2 and for Seat 3.

Possible “Process” of Filling Vacancies

One process that could be considered would be to have each member of the City Commission given an opportunity to nominate some qualified person(s) and explain to the remaining Commissioners why they consider the nominee(s) to be appropriate to fill the vacancies.

If there are only two nominees, there could be a vote as to each (specifying which seat would be filled by each nominee), and assuming that each nominee receives at least two positive votes, the process would be completed. Of course, before any vote, public comment must be allowed.

If there are more than two nominees, then it is suggested that after public comment, the names of the nominees be written on sheets of paper by the Commissioners and each Commissioner rank the nominees by putting a 1 by their first choice, a 2 by their second choice, etc. The sheets of

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paper would be signed by each Commissioner, and they would be handed to the City Manager and the City Clerk for tabulation.

The nominee with the lowest total score would be chosen to fill one of the two vacant seats, and the nominee with the second lowest score would be chosen to fill the other of the two vacant seats. If there were a tie for either position (lowest or second lowest score), then the process could be repeated to break the tie. If a tie cannot be broken by two more “ballots,” the tie could be broken by a coin flip.

After this process, there should be votes to “appoint” the two chosen nominees. Since public comment would have already been received on this subject, no further public comment would be required.

The above is certainly not the only method that could be used to appoint new City Commissioners to fill the two vacancies on the City Commission, and other methods could be discussed at the workshop scheduled for 5:00 P.M. next Tuesday.

In any event, whatever “process” is chosen for the appointment, the process should be articulated at the Regular City Commission and voted upon (after the taking of public comment on the process) to establish the process before it is implemented.

I recommend that the appropriate motion to appoint a commissioner be:

“I move to appoint _____ as City Commissioner to fill the vacant Seat __ [insert 2 or 3] for an approximate 10 month term ending on November 12, 2024.”

I have also been asked to opine on the application of the term limit provisions of Sec. 2.01 of the Daytona Beach Shores Charter to these 10 month terms, taking into account the time period for the terms for Seat 2 (a four year term to begin on November 12, 2024), and for Seat 3 (a two year term to begin on November 12, 2024). Sec. 2.01 of the Charter provides:

Sec. 2.01. Composition; term limits; mayor and city commission.

There shall be a city commission consisting of five (5) members, one of whom shall be a mayor, all of whom shall be elected at-large for a four (4)-year term. Unless otherwise provided, reference to the office of commissioner in this charter shall also apply to the office of mayor. No person shall be elected or appointed to office as a city commissioner for more than two (2) terms. This section applies to any commissioner including the mayor and a person shall not circumvent this rule through election or appointment to a different position. For purposes of this limitation, "term" is defined as service on the city commission for a period longer than one-half of a full term. All terms, including past and present terms, greater than one-half of a full term served by current and former city commission members shall count for the purposes of applying the term limit.

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Assuming that there is no change to the above quoted Charter language, and there is no contrary court determination, it is my opinion that an approximate 10 month term to end November 12, 2024, would be considered a “term” that would be considered in determining whether a city commissioner had provided “service on the city commission for a period longer than one-half of a full term.” For that reason, if a City Commissioner were appointed to fill an approximate ten month term in either Seat 2 or 3, and subsequently ran for election for Seat 3 and served the 2 year term for Seat 3, that City Commissioner would be term-limited out after serving less than 7 years as a City Commissioner assuming they ran for re-election for any seat after the end of the 2 year Seat 3 term.

If you have any questions or concerns, please give me a call at your convenience.