

NOTE: There is a three-minute time limit on all comments from the public, regardless of the subject matter. A request form is available from the Deputy Town Clerk; please fill it in and return it to her prior to the start of the meeting if you would like to speak during public comment. When you speak, you must come to the podium in the front and clearly state your name and address for the record. Please turn off or mute your cell phone or pager at the start of the meeting. Thank you.

TOWN OF BAY HARBOR ISLANDS
SPECIAL COUNCIL MEETING AGENDA

March 19, 2020

CALL TO ORDER: 9:00 a.m.

PLEDGE OF ALLEGIANCE:

ROLL CALL:

ORDINANCES ON FIRST AND SECOND READING:

1. **Consideration and Approval** of an emergency ordinance on first and second reading to postpone the Town's General Election schedule for April 7, 2020 to a future date in accordance with the options outline below. Enclosed is a copy of the proposed ordinances (Options 1 and 2).

OPTION 1

AN EMERGENCY ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF BAY HARBOR ISLANDS, FLORIDA, TEMPORARILY AMENDING SECTION 6-2(A) OF THE TOWN'S CODE OF ORDINANCES TO POSTPONE THE TOWN ELECTION FROM APRIL 7, 2020 UNTIL MAY 5, 2020 DUE TO THE CORONAVIRUS (COVID-19) WITH A RUNOFF DATE OF JUNE 4, 2020, IF NECESSARY; KEEPING IN PLACE ALL OTHER PROVISIONS OF SECTION 6-2 AS IF THE ELECTION WERE HELD ON APRIL 7, 2020; PROVIDING FOR SEVERABILITY; PROVIDING FOR CODIFICATION; AND PROVIDING AN EFFECTIVE DATE.

OPTION 2

AN EMERGENCY ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF BAY HARBOR ISLANDS, FLORIDA, TEMPORARILY AMENDING SECTION 6-2(A) OF THE TOWN'S CODE OF ORDINANCES TO POSTPONE THE TOWN ELECTION FROM APRIL 7, 2020 UNTIL AUGUST 18, 2020 DUE TO THE CORONAVIRUS (COVID-19) WITH A RUNOFF DATE OF SEPTEMBER 17, 2020, IF NECESSARY; KEEPING IN PLACE ALL OTHER PROVISIONS OF SECTION 6-2 AS IF THE ELECTION WERE HELD ON APRIL 7, 2020; PROVIDING FOR SEVERABILITY; PROVIDING FOR CODIFICATION; AND PROVIDING AN EFFECTIVE DATE.

STAFF RECOMMENDATION: Council Discretion

POLL VOTE

PUBLIC COMMENT: *This meeting is being conducted primarily by telephone conferencing so if you would like to participate by listening to the meeting as it happens, you can call Toll Free (855) 212-0212, and use Meeting ID:*

390-048-993. Or you can watch on our website live at: <https://www.bayharborislands-fl.gov/129/Agendas-Meeting-Recordings>

ADJOURNMENT: 9:15 a.m.

Pursuant to Florida Statutes 286.0105, the Town hereby advises the public that should any person decide to appeal any decision of the Town Council with respect to any matter to be considered at this meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

AGENDA ITEM REPORT

March 19, 2020

ITEM NUMBER: 1.

ITEM: Consideration and Approval of an emergency ordinance on first and second reading to postpone the Town's General Election schedule for April 7, 2020 to a future date in accordance with the options outline below. Enclosed is a copy of the proposed ordinances (Options 1 and 2).

DESCRIPTION:

The proposed emergency ordinance is to consider the postponement of the the Town's General Election currently schedule for April 7, 2020 to a future date in accordance to recent federal guidelines and safety measures being put in place by the CDC (Center for Disease Control), Health Department, Florida's Governor Ron DeSantis and the President of the United States with regard to the Coronavirus (COVID-19), and in accordance to Section 101.733, Florida Statutes.

Enclosed are copies of the proposed ordinances (Option 1 and 2) and a legal opinion from Town Attorney Frank Simone regarding the conferencing call meeting.

RECOMMENDED ACTION:

Council Discretion

FINANCIAL ANALYSIS:

BUDGET IMPACT:

Submitted By: Alba Chang, Deputy Town Clerk

ATTACHMENTS

1. opt 1 Election Delay - Ordinance
2. op-2 - Election Delay - Ordinance - Election Date of August 18
3. TA_Memo - Emergency Meeting via Telephone Conference During a State of Emergency

ORDINANCE NO. _____

**AN EMERGENCY ORDINANCE OF THE TOWN COUNCIL
OF THE TOWN OF BAY HARBOR ISLANDS, FLORIDA,
TEMPORARILY AMENDING SECTION 6-2(A) OF THE
TOWN'S CODE OF ORDINANCES TO POSTPONE THE
TOWN ELECTION FROM APRIL 7, 2020 UNTIL MAY 5,
2020 DUE TO THE CORONAVIRUS (COVID-19) WITH A
RUNOFF DATE OF JUNE 4, 2020, IF NECESSARY;
KEEPING IN PLACE ALL OTHER PROVISIONS OF
SECTION 6-2 AS IF THE ELECTION WERE HELD ON
APRIL 7, 2020; PROVIDING FOR SEVERABILITY;
PROVIDING FOR CODIFICATION; AND PROVIDING AN
EFFECTIVE DATE.**

WHEREAS, the Town Council is charged with the protection of the health, safety and welfare of the Town's residents;

WHEREAS, Novel Coronavirus Disease 2019 (COVID-19) is a severe acute respiratory illness that can spread among humans through respiratory transmission and presents with symptoms similar to those of influenza, but with a significantly greater estimated mortality rate;

WHEREAS, the World Health Organization has declared COVID 19 to be a Public Health Emergency of International Concern;

WHEREAS, the State of Florida on March 9, 2020, declared a state of emergency as a result of COVID 19;

WHEREAS, on March 11, 2020, the Town declared a state of emergency as a result of COVID 19;

WHEREAS, the Federal Government on March 13, 2020, declared a state of emergency as a result of COVID 19;

WHEREAS, on March 16, 2020, the Federal Government issued guidance that, among other things, persons stay home and practice "social distancing," including no gathering to exceed ten (10) persons, in an effort to stem the infection rate of COVID 19;

WHEREAS, the Town's election is presently scheduled for April 7, 2020;

WHEREAS, due to COVID 19, the candidates have not and will not have an opportunity to campaign for election based upon the present election date of April 7, 2020; and

WHEREAS, the Town does not want to subject its residents to COVID 19, many of whom are elderly and whom are most susceptible to COVID 19, or otherwise facilitate an outbreak of COVID 19 within the Town due to the election; and

WHEREAS, the Town’s Supervisor of Elections and the Miami-Dade County Supervisor of Elections have agreed that the Town may postpone its election from April 7, 2020 until May 5, 2020, with a runoff date of June 4, 2020, if necessary, in accordance with Sec. 101.733, Fla. Stat.

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF BAY HARBOR ISLANDS, FLORIDA:

Section 1: Section 6-2(a) of the Town Code shall be temporarily amended to allow the election presently scheduled on April 7, 2020 to be postponed until May 5, 2020, and with a runoff date of June 4, 2020, if necessary. All other dates set forth in Section 6-2 shall remain in effect as if the election were held on April 7, 2020, including, but not limited to, the qualifying period being closed with three (3) candidates qualifying for the Town’s election. After this temporary amendment and postponement, this emergency ordinance shall sunset and expire and Section 6-2(a) shall revert back to its prior language.

Section 2: That if any section, paragraph, sentence or word of this Ordinance or the application thereof to any person or circumstance is held invalid, that the invalidity shall not affect the other sections, paragraphs, sentences, words or application of this Ordinance.

Section 3: That it is the intention of the Town Council of the Town of Bay Harbor Islands, Florida, and it is therefore ordained, that the provisions of the Ordinance shall become and be made a part of the Town of Bay Harbor Islands’ Code of Ordinances, that sections of this Ordinance may be re-numbered or re-lettered to accomplish such intentions, and that the word “Ordinance” shall be changed to “Section” or other appropriate word.

Section 4: That all Ordinances, parts of Ordinances, Resolutions or parts of Resolutions in conflict herewith be and the same are hereby repealed to the extent of such conflict.

Section 5: That this Ordinance shall be in full force and take effect upon its passage and adoption and subset as set forth above.

PASSED AND ADOPTED on this 19th day of March 2020.

STEPHANIE BRUDER
Mayor

ATTEST:

MARLENE SIEGEL
Town Clerk

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:

FRANK C. SIMONE, ESQ.
Town Attorney

ORDINANCE NO. _____

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WHEREAS, the Town's election is presently scheduled for April 7, 2020;

WHEREAS, due to COVID 19, the candidates have not and will not have an opportunity to campaign for election based upon the present election date of April 7, 2020; and

WHEREAS, the Town does not want to subject its residents to COVID 19, many of whom are elderly and whom are most susceptible to COVID 19, or otherwise facilitate an outbreak of COVID 19 within the Town due to the election; and

WHEREAS, the Town’s Supervisor of Elections and the Miami-Dade County Supervisor of Elections have agreed that the Town may postpone its election from April 7, 2020 until August 18, 2020, with a runoff date of September 17, 2020, if necessary, in accordance with Sec. 101.733, Fla. Stat.

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Section 3: That it is the intention of the Town Council of the Town of Bay Harbor Islands, Florida, and it is therefore ordained, that the provisions of the Ordinance shall become and be made a part of the Town of Bay Harbor Islands’ Code of Ordinances, that sections of this Ordinance may be re-numbered or re-lettered to accomplish such intentions, and that the word “Ordinance” shall be changed to “Section” or other appropriate word.

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Section 5: That this Ordinance shall be in full force and take effect upon its passage and adoption and subset as set forth above.

PASSED AND ADOPTED on this 19th day of March 2020.

STEPHANIE BRUDER
Mayor

ATTEST:

MARLENE SIEGEL
Town Clerk

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:

FRANK C. SIMONE, ESQ.
Town Attorney

FRANK SIMONE P.A.

Law Offices

701 BRICKELL AVENUE
SUITE 1550
MIAMI, FLORIDA 33131

TELEPHONE (305) 221-8000
TELEFAX (305) 357-2510

WEBSITE: FrankSimone.com

Date: March 17, 2020

From: Frank C. Simone, Esq., Town Attorney

To: Marlene Siegel, Town Clerk/Supervisor of Elections

Re: Whether an Emergency Town Council Meeting noticed to postpone the Town Election due to the Coronavirus Disease 2019 (COVID-19) outbreak during Federal, State, and Local States of Emergency (during which the Federal Government has issued guidance that no gatherings of more than ten (10) persons should occur) may be conducted via telephone conference provided that the speakerphone is located in Town Hall and Town residents are provided with an opportunity to speak and be heard when certain council members may be required or find it necessary to self-quarantine.

Facts

Within the last week, the Federal Government, the State of Florida, and the Town have declared states of emergencies due to the Coronavirus Disease 2019 (COVID-19), a severe acute respiratory illness that can spread among humans through respiratory transmission and presents with symptoms similar to those of influenza, but with a significantly greater estimated mortality rate. The Federal Government has issued guidelines that no gatherings to exceed ten (10) persons shall occur.

During this same period of time, certain Town Council Members may have contact with: 1) a Town employee who tested positive for COVID-19; and 2) the Rabbi of the Shul of Bal Harbour who tested positive for COVID-19. As a result, certain Council Members may be required or find it necessary to self-quarantine. They may be required to do so when a Town election is presently scheduled to occur on April 7, 2020, and the Town's Supervisor of Elections and the Miami-Dade County Supervisor of Elections have agreed that the Town may postpone its election from April 7, 2020 until May 5, 2020, with a runoff date of June 4, 2020, if necessary, in accordance with Sec. 101.733, Fla. Stat. The Town does not want to subject its residents to COVID 19, many of whom are elderly and whom are most susceptible to COVID 19, or otherwise facilitate an outbreak of COVID 19 within the Town due to the election. As a result, it is in the Town's best interest to postpone the election.

Question Presented

This memo addresses the following question: whether an Emergency Town Council Meeting noticed to postpone the Town Election due to the Coronavirus Disease 2019 (COVID-19) outbreak during Federal, State, and Local States of Emergency (during which the Federal Government has issued guidance that no gatherings of more than ten (10) persons should occur) may be conducted via telephone conference provided that the speakerphone is located in Town Hall and Town residents are provided with an opportunity to speak and be heard when certain council members may be required or find it necessary to self-quarantine.

Law

Over the years, various Florida Attorney General Opinions have addressed the issue of whether a public official may attend a municipal meeting remotely. As the technology has evolved, so have the opinions.

For example, Attorney General Robert Butterworth issued 92-44 Op. Att’y Gen. (1992) in response to an inquiry from the Hillsborough County attorney opined that the law did not prohibit a commissioner who was undergoing medical treatment from attending a commission meeting via voice and video feed, as well as participating and voting on matters, so long as a quorum of members was physically present. The attorney general noted that use of technology to conduct meetings was “once considered to be experimental and controversial, now commonplace,” and the capability of communications technology had “dramatically improved” in its ability to allow for full remote participation in meetings. The opinion noted that the interactive technology to be used would allow for “extensive participation” by the remote commissioner, including the ability to see and hear all fellow commissioners and the audience. It also observed that the legislature, by adopting F.S. §120.53(6) (currently found at F.S. §120.54(5)(b)(2)), had even ordered all state agencies to draft plans to allow for electronic meetings by stated officials and boards.

92-44 Op. Att’y Gen. (1992) makes no mention of the physical presence standard established in 83-100 Op. Att’y Gen. (1983). Instead, the attorney general concluded that remote electronic attendance would be permitted if 1) a quorum of commissioners was physically present at the meeting, and 2) the remote commissioner was unable to attend due to medical condition. The Attorney General further concluded that any “action taken by the commissioner would be presumptively valid” unless a court found otherwise. This opinion created the “sick + quorum” standard, used in subsequent opinions such as 94-55 Op. Att’y Gen. (1994) (city museum board member) and 98-28 Op. Att’y Gen. (1998) (school board member).

In 02-82 Op. Att’y Gen. (2002), Attorney General Richard Doran was asked whether physically disabled member of the Miami Beach Barrier-Free Environment Committee could appear and vote by electronic means. Following the “sick + quorum” standard, the attorney general sanctioned the electronic attendance. The opinion specifically recognized the argument that, since F.S. §120.54(5)(b)(2) allowed state agencies and their boards to meet and vote via electronic means *regardless* of physical ailments or disabilities, local and regional boards should be allowed the same option because the Florida Constitution addressed them all in the same paragraph discussing open meetings. However, the attorney general, quoting from 98-28 Op. Att’y Gen. (1998), opined:

In 94-55 Op. Att'y Gen. (1994), Attorney General Butterworth advised the Miami Beach City Attorney that an out-of-state member of the Bass Museum board could appear and vote by speaker phone, even though the museum board was not a state agency. The attorney general went on to say the "board may look to the model rules promulgated pursuant to this statute for direction in conducting telephone meetings" as a way to ensure compliance with the Sunshine Law's meeting requirement.

06-20 Op. Att'y Gen. (2006), seem to back away from requiring any unique reason to be absent, such as illness, disability, or extraordinary circumstance. Instead, the Hillsborough County Metropolitan Planning Organization (MPO) was advised that it could use video links to link its citizens' advisory committee (CAC) with the CACs of other MPOs, as long as each committee had a physical quorum present. Of significant interest, this opinion states:

The use of interactive electronic media to increase public participation in meetings and the use of such media to allow members of a board or commission to participate in a duly noticed public meeting does not necessarily raise Sunshine Law issues, but rather implicates the ability of an entity to conduct official business with a quorum.

This opinion, adopting the "any reason + quorum" standard, appears for the first time to acknowledge that the Sunshine Law simply does not define the term "meetings," and the reality of the modern world is that meetings can and do occur electronically. Noting the right the legislature gave state agencies and boards to meet electronically, the opinion encourages the MPO to seek legislative authorization that would allow regional boards spanning multiple counties to meet.

The courts have made it clear that when two or more members of a Sunshine-governed body communicate with each other on official business--regardless of how they communicate--they *are* having a meeting for Sunshine Law purposes, and such meeting violates the act by failing to provide notice and/or to meet at a public place. So, while some specific statute or a board's or commission's own procedural rules may define "quorum" as physical presence of a minimum number of members, the Sunshine violation cases clearly indicate that a Sunshine meeting *can* occur between two members via electronic means. *City of Sunrise v. News and Sun Sentinel Co.*, 542 So. 2d 1354 (Fla. 4th DCA. 1989); *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973); *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); and *Wolfson v. State*, 344 So. 2d 611 (Fla. 2d DCA 1977). *See also* 93-79 Op. Att'y Gen. (1993) (discussion among two members a Sunshine violation).

Until the legislature provides statutory clarification or definition of the word "meeting" to require physical presence or, alternatively, confirms the availability of remote electronic participation in emergency situations or otherwise, the plain reading of the statute is that a meeting is a meeting, whether members are present in physical form or via electronic communication technology. Thus, attendance by any number of the members of a Sunshine body via electronic means does not on

its face violate the plain language of the statute as written. *See Modern Sunshine: Attending Public Meetings in the Digital Age*. 84-APR Fla. B.J. 28 (Robert Michael Eschenfelder. April 2010).

The forgoing opinion is buttressed by the recent administrative order of the Florida Supreme Court entered on March 13, 2020. In AOSC20-13, the Florida Supreme court, as a result of and during the COVID 19 pandemic, ordered that to mitigate the spread of COVID 19, all trials are suspended through March 27, 2020 (or provided by subsequent order), and that temporary procedures for the use to the extent feasible of **“communication equipment for the conducting of [court] proceedings by remote electronic means, as are necessary in their respective circuits due to the public health emergency.”** (Emphasis added).

Conclusion

Based upon the foregoing, it is the Town Attorney’s opinion that under the unique facts at issue, the question presented above is answered in the affirmative. The Town Council may conduct a meeting via telephone conference if a physical presence of a quorum of Town Council Members cannot be obtained at Town Hall due to self-quarantining, provided that a quorum of the Town Council attends the telephone conference meeting, the speaker phone is physically located in Town Hall, and residents have the right to speak and be heard. This opinion is narrowly tailored to the facts at issue and question presented. This opinion does not and will not pertain to any other Town Council Meeting.